Supreme Court of the United States

OCTOBER TERM, 1967

No. 1049

FEDERAL TRADE COMMISSION, PETITIONER

v.

TEXACO, INC., AND THE B. F. GOODRICH COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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295-454—68——1

Decision of the United States Court of Appeals for the District of Columbia Circuit, Texaco, Inc., Petitioner, v. Federal Trade Commission, Respondent and the B. F. Goodrich Company, Petitioner, v. Federal Trade Commission, Respondent, 118 App. D.C. 366, 336 F. 2d 754

(July 30, 1964)

Mr. Milton Handler, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, New York City, with whom Messrs. James O. Sullivan and Frederick W. P. Lorenzen, New York City, were on the brief, for petitioner in No. 17915.

Mr. Edgar E. Barton, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, New York City, for petitioner in No. 17923.

Mr. John F. Doyle, Washington, D.C., also entered an appearance for petitioner in No. 17923.

Mr. Alvin L. Berman, Atty., Federal Trade Commission, with whom Messrs. James McI. Henderson, Gen. Counsel, and Louis Russell Harding, Atty., Federal Trade Commission, were on the brief, for respondent in Nos. 17915 and 17923.

Before Wilbur K. Miller, Washington and Burger, Circuit Judges.

Wilbur K. Miller, Circuit Judge.

Texaco, Inc. (formerly The Texas Company) and The B. F. Goodrich Company have filed separate petitions for review of an order of the Federal Trade Commission which was issued April 15, 1963, after proceedings which will be described. The cases were heard together and will be disposed of in a single opinion.

On January 11, 1956, after an investigation which began at least as early as 1952, the Federal Trade Commission issued a complaint against the petitioners charging them with violating Section 5 of the Fedearl Trade Commission Act, 15 U.S.C. § 45, by engaging in unfair methods of competition in interstate commerce. Specifically, the object of the Commission's attack was the implementation of a contract between the two companies, entered into in 1940, in which Texaco undertook, in

return for a commission to promote the sale of Goodrich tires, batteries and accessories (TBA) to its thousands of dealers in its petroleum products. It was alleged that Texaco has entered into a similar contract with Firestone Tire & Rubber Company.

The complaint stated that influence and control over the purchasing and marketing activities of its dealers has been and is being exercised by Texaco "by recommending, urging, persuading and causing them to purchase a substantial quantity of TBA products from Goodrich and Firestone, the sellers designated by it." The acts and practices of Goodrich and Texaco under the commission contract, the complaint said,

> "* * * have unduly frustrated, hindered, suppressed, lessened, restrained, prevented and eliminated competition in the sale of TBA products in commerce within the intent and meaning of the Federal Trade Commission Act; have the capacity and tendency to restrain unreasonably and have restrained unreasonably such commerce in said products; and constitute unfair methods of competition and unfair acts and practices, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act."

3 Essentially, the complaint was that Texaco coerces its dealers, through economic pressure, to distribute Goodrich TBA and thus unfairly and unlawfully prevents Goodrich's competitors from selling TBA to Texaco's outlets.

Answers by the companies placed the essential allegations of the complaint in issue, after which evidentiary hearings were conducted over a period of nearly three years. They were concluded December 10, 1958. The examiner, in his initial decision issued October 23, 1959, found that Goodrich had not done anything to force Texaco outlets to buy its products; that there was neither charge nor proof that Goodrich had conspired with Texaco to restrain competition; and that the commissions paid by it under the contract were for substantial services rendered by Texaco in promoting the sale of its products. Accordingly, the initial decision of October 23, 1959, dismissed the complaint against Goodrich.

With respect to Texaco, the examiner found that the contracts between Texaco and its dealers do not contain any provision requiring the latter to purchase only Goodrich TBA. He said the commission paid to Texaco by Goodrich is based on sub-

stantial services rendered by Texaco in promoting the sale of Goodrich TBA, and added:

> "No inference or implication can be drawn, simply from the contractual relationship between Texas and its dealers, that the degree of control by Texas over its dealers is sufficient to force its dealers to purchase only sponsored TBA."

The examiner found, however, that

> "* * * the record in this proceeding *as a whole* indicates that coercion and pressure was [*sic*], in fact, brought on *a substantial number of dealers* to induce them to purchase sponsored TBA and to discontinue the purchase or display of non-sponsored items." [1] [Emphasis supplied.]

Pursuant to this, the examiner's initial decision of October 23, 1959, ordered Texaco to cease and desist from coercing its dealers into purchasing TBA from any particular supplier.

In keeping with the deliberate progress of this proceeding, the Commission did not act on the initial decision of October 23, 1959, until March 9, 1961. On that day it handed down an opinion in which it not only reversed the examiner's dismissal of Goodrich but also found

> "* * * that Texaco had sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics * * *"

Proceeding from its assumption that Texaco had controlling economic power over its dealers, "even without the use of overt coercive tactics," the Commission said:

> "* * * the determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the*

[1] This was a rather extraordinary conclusion in view of the fact that not one of Texaco's more than 28,000 dealers was called to testify before the examiner in support of the complaint. The examiner based the statement on the testimony of five former Texaco dealers who said they had been coerced, although five other former dealers and 54 active dealers called by Texaco said they had never been coerced or influenced in any way as the Goodrich TBA.

competitive effects of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the use of overt coercive tactics, or by more subtle, but equally effective, means.

"At issue in this litigation, then, is the legality of a particular method of distributing TBA used by respondents. A key fact in evaluating the competitive effects of respondents' use of the sales commission method of distributing TBA is the fact that Texaco has sufficient economic power with respect to its retail and wholesale petroleum distributors to cause them to purchase substantial quantities of the brand of TBA sponsored or sold by Texaco. But such economic power is a fact existing independently of any particular method of distributing TBA which Texaco may use. Whether the sales commission agreements between Firestone and Texaco and Goodrich and Texaco are unlawful must depend, therefore, upon the characteristics and the competitive effects of these sales commission agreements. For reasons set forth hereinafter, we conclude that this case must be remanded in order that market data may be introduced to show the competitive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels."

Having thus concluded that the legality of the sales commission agreements depends upon "the characteristics[3] and the competitive effects" of the agreements, the Commission closed its opinion by saying:

"However, the record in this case does not contain sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents. The case will be remanded to the hearing examiner for the taking of evidence indicating the competitive effects of the sales commission contracts at the manufacturing, wholesale and retail levels of TBA distribution."

[3] The "characteristics" of the agreements were of course fully known to the Commission, which had before it their complete text.

More than a year after the remand of March 9, 1961,[3] the examiner conducted hearings from July 16 to July 19, 1962, at which the only proof introduced was in the form of exhibits received over the objection of the petitioners. A new initial decision was filed by the examiner September 24, 1962. In it he incorporated the findings of fact of his first initial decision and made additional findings of fact based on the record as supplemented after remand. The examiner noted that he was bound by the Commission's reversal of his dismissal of Goodrich, and by its finding that Texaco has sufficient economic power over its dealers to cause them to purchase substantial amounts of sponsored TBA, even without the use of coercive tactics. He concluded that

> "* * * the only issue left for consideration of the hearing examiner under the terms of the Commission's opinion and order of remand, is the competitive effects of the sales commission plan used by Goodrich with The Texas Company, and whether Texaco's exercise of such economic power in favor of Goodrich and Firestone under their sales commission contracts have sufficient competitive effect to constitute an unfair method of competition or an unfair act or practice."

The examiner disposed of the "only issue left for [his] consideration" by concluding that

> "The use of the sales commission plan of distribution of TBA by the respondents, The Texas Company and The B. F. Goodrich Company as herein found, has a tendency and capacity to restrict, restrain or lessen competition in the sale of TBA products and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

In obedience to the Commission's order on remand, the examiner abandoned his former position, held Goodrich as a respondent, and concluded:

> "The use of the sales commission method of distribution by Goodrich was designed to take advantage of the economic control which Texaco had over its dealers, and

[3] A part of this period was consumed in the petitioners' unsuccessful attempt to enjoin further hearings.

by such use, Goodrich was able to obtain an unfair advantage over its competitors in selling to Texaco stations and in addition, aided and abetted Texaco in removing from the open market a substantial number of new and established Texaco dealers by causing them to purchase Goodrich TBA exclusively or in substantial quantities, and thereby excluding competitors of Goodrich who might otherwise have been able to sell their TBA to a substantial number of such Texaco dealers."

Although he had the first time dismissed Goodrich, and had merely ordered Texaco to cease and desist from the coercive practices he had found from the testimony of five ex-dealers, this time the examiner entered a broad order as to both respondents. He ordered Texaco to cease and desist from entering into or continuing in effect any contract with Goodrich or any other rubber company or tire manufacturer, or any other supplier of tires, batteries or accessories, by the terms of which Texaco receives anything of value in connection with the sale of TBA to its dealers. The examiner ordered Goodrich to cease and desist from operating under its contract with Texaco and prohibited it from entering into a similar contract with any other marketing oil company.

The order of remand of March 9, 1961, was entered by a Commission composed of Chairman Kintner and Commissioners Secrest, Anderson and Kern. Accompanying it was the opinion to which we have referred, written by Chairman Kintner and concurred in by the other three members of the Commission. Shortly thereafter—on March 21, 1961—Earl W. Kintner was replaced as Chairman by Paul Rand Dixon, who had not been a member of the Commission theretofore. One of the acts of the new Chairman when he had been in office only a short time led to the phase of the proceeding which we shall now consider.

On February 18, 1963, before the Commission had acted on the examiner's new initial decision of September 24, 1962, Texaco filed a motion that Chairman Dixon withdraw from participation in the proceeding or that the Commission determine him to be disqualified. The basis of the motion was a speech made by Dixon before the National Congress of Petroleum Retailers, Inc., in Denver, Colorado, on July 25, 1961, while the case was pending before the examiner after remand and before any steps had been taken by him. In the course of his address,

according to a press release issued by the Commission itself, the then newly appointed Chairman of the Commission said:

"Your problems are many, and many of them are the problems of the Federal Trade Commission, too, for the Commission is concerned with promoting fair competition. More particularly, many of your problems are ours because they arise from practices prohibited by two of the most important statutes administered by the Commission—discriminatory pricing, prohibited by the Robinson-Patman Act, and other unfair acts, practices, and methods of competition, prohibited by the Federal Trade Commission Act.

* * * * *

"We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases.

"You know the practices—price fixing, price discrimination, and overriding commissions on TBA.

"You know the companies—Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone.

* * * * *

"Some of these cases are still pending before the Commission, some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry."

The Commission denied the motion that it determine Chairman Dixon to be disqualified, and he declined to withdraw from participation. Instead, he took part in the entry of the order of April 15, 1963, more than two years after the remand, which adopted the examiner's initial decision and order of September 25, 1962, which, as we have seen, was adverse to Texaco and Goodrich and which is now under review. Before turning to the question whether the order of April 15, 1963, was supported by the record, we consider the propriety of Chairman Dixon's participation in that decision.

In *Gilligan, Will & Co. v. Securities and Exchange Comm'n*, 2 Cir., 267 F. 2d 461 (1959), the Commission, three days after

commencing proceedings, issued a press release stating in effect that Gilligan, Will & Co. and others had violated Section 5 of the Securities Act of 1933. Although the Second Circuit held that petitioners' failure to make timely objection had waived their right to assert the defect of prejudgment, the Court strongly disapproved of the Commission's behavior. It said, at pages 468–9:

> "* * * [T]he Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.* * *"

In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.

We said in *Amos Treat & Co.* v. *Securities and Exchange Comm'n*, 113 U.S. App. D.C. 100, 107, 306 F. 2d 260, 267 (1962):

> "* * * [A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."

The administrative hearing in the present case was certainly as important as that in the *Amos Treat* case, and has perhaps even greater potential consequences. We conclude that Chairman Dixon's participation in the hearing amounted in the circumstances to a denial of due process which invalidated the order under review. If that were the only infirmity in the order, we should be constrained to remand the cases to the Commission for a *de novo* consideration in which Chairman Dixon does not take part. His Denver speech, made before the matter was submitted to the Commission but while it was before the examiner, plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act, and that he would protect the petroleum retailers from such abuses.

But that is not all. The Supreme Court has said that in reviewing the substantiality of the evidence we must consider all the evidence including "the body of evidence opposed to the

Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487–8, 71 S. Ct. 456, 465, 95 L. Ed. 456 (1951). Viewed in this way we are convinced that the order of April 15, 1963, is not supported by substantial evidence on the record as a whole. The order under review, as we have said, adopted the examiner's initial decision and order of September 24, 1962, after slight modification. In it, the Commission said:

> "Respondents contend that the tables, surveys, and matters officially noticed by the examiner on remand were improperly admitted both because they are inappropriate objects for official notice and because respondents were afforded inadequate opportunity to rebut them.
>
> "It is not necessary to pass upon the correctness of these contentions, since the Commission excludes from its present decision any reliance upon the challenged evidence. It finds that the other evidence of record amply supports the conclusions and the order of the hearing examiner. The legal principles relevant to this decision need not be reexamined here because they are set forth at length in the opinions of the Commission in Goodyear Tire & Rubber Co., et al., Docket 6486, March 9, 1961, and Firestone Tire & Rubber Co., et al., Docket 6487, March 9, 1961. * * *"[4]

Thus, in its consideration of the revised initial decision and order, the Commission expressly disclaimed any reliance upon the evidence introduced after remand, and held that the evidence or record before the remand "amply supports the conclusions and order of the hearing examiner." This was the same record which the Commission on March 9, 1961, had said "does not contain sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents."

But, in successfully resisting an action in the District Court by Texaco and Goodrich to enjoin the remand, the new Commission contended that it "needed additional evidence in order to decide the issues presented." It asserted that the opinion of

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[4] It is perhaps not without significance that Commissioner Anderson, the only member of the Commission as constituted on April 15, 1963, who had participated in the remand of March 9, 1961, did not concur "for the reason that the command of the remand order of March 9, 1961, has not been met and complied with * * *."

March 9, 1961, ordering the remand showed that the Commission "is not seeking a retrial of matters already tried but rather envisions supplementary evidence on what it considered to be significant facts in any assessment of the competitive effects of the sales commission agreements * * *."

Despite these representations, the Commission on April 15, 1963, contrary to the former Commission's determination that the record did not justify such a finding, found the petitioners in violation of Section 5 of the Federal Trade Commission Act on the basis of that record. It adopted the examiner's revised order which prohibited Goodrich from entering into sales commission agreements with Texaco or any other marketing oil company, and prohibited Texaco from entering into such agreements with Goodrich or any other rubber company or tire manufacturer, or any other supplier of tires, batteries or accessories.

The new Commission placed itself in an anomalous position: first, it vigorously asserted (as the former Commission had held when it remanded the proceeding) that it could not find against the petitioners without additional evidence as to the competitive effects of the sales commission contracts; then, it decided that same issue against the petitioners without any consideration of the record made after remand, and without repudiating or even commenting upon its confessed inability to reach that issue previously.

Although the two Commissions reached diametrically opposite conclusions from the same record as to whether unfair competition had been shown, both based their action upon their conclusion that

> "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA *even without the use of overt coercive tactics.* * * *."[5] [Emphasis supplied.]

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[5] Although the examiner concluded in his first initial decision that the record "as a whole" indicated coercion had been brought on "a substantial number of dealers" (five former dealers out of many thousands of former and active dealers), the remanding Commission apparently did not regard such meager proof as convincing, for it expressly discarded it as a basis of decision, and concluded as stated in the text above that Texaco had controlling economic power over its dealers without the use of coercive tactics.

The examiner's first initial decision had not so concluded, but the remanding Commission's conclusion as to Texaco's economic power was parroted by him in his initial decision after remand. He added thereto the following

"But neither Commission referred to any evidence in support of this finding, and neither made any finding of fact which would sustain a conclusion that Texaco had such economic power over its dealers, and we are unable to see substantial evidence on the record as a whole to sustain that conclusion. The Commission did not reject its examiner's statement that no inference can be drawn from the contracts between Texaco and its dealers that the former has sufficient economic power over the latter to force them to purchase only sponsored TBA. And it did not say (for there was no proof from which it could conclude) that Texaco's treatment of its dealers and their reaction indicated that Texaco had, or had attempted to exercise, the controlling economic power over its dealers that the Commission found. Indeed, the examiner found as a fact that Texaco's policy, announced to all its salesmen as long ago as June 1, 1948, is that it has neither the right nor the desire to dictate to the dealer or to influence him in any way as to the type of merchandise he should handle, or the source from which he should purchase it.[8] This finding was adopted by the Commission.

Consequently, we find no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers. The contracts with the dealers do not give rise to it, and it is the announced policy of Texaco to respect the independence of its dealers; as the evidence overwhelmingly shows, its practice has followed its policy. The mere

sentence selected from another portion of the remanding Commission's opinion; "Such economic power exists independent of any particular method of distributing TBA which Texaco might use." This new conclusion was adopted by the Commission in its decision of April 15, 1963. Consequently, both Commissions concluded that Texaco had controlling economic power without the use of coercive tactics.

[8] Finding of Fact No. 8 in the examiner's post-remand initial decision is as follows:

"As a result of an antitrust suit filed against Standard Oil Company of California, Walter Hochuli, General Sales Manager of The Texas Company, on June 1, 1948, issued a so-called policy letter to the territorial managers, which was subsequently disseminated down the chain of command to salesmen. This letter advised the personnel that they were to consider a Texaco dealer as an independent businessman; that he should be encouraged to expand his business by purchasing TBA; that the personnel have a right to recommend certain lines, but that Texas has neither the right nor the desire to dictate to the dealer or to influence him in any way as to the type of merchandise he should handle, or the source from which he should purchase it; that the Texaco dealer must be permitted to operate as an independent businessman and anyone who violates this policy would be subject to immediate dismissal."

fact that Texaco is a giant corporation and the dealers are in the main small businessmen cannot be said to demonstrate controlling economic power over the latter, particularly when, as here, the evidence is to the contrary. We hold, therefore, that the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA. We have already noted that the Commission did not find coercive tactics had been used, and that the record as a whole demonstrates the contrary.

From its unwarranted assumption that Texaco had such economic power, the Commission proceeded to the conclusion that the question whether the exercise of that power in Goodrich's behalf amounts to an unfair method of competition depends on the "competitive effects" of the sales commission agreements. It said that Texaco's controlling economic power is a "key fact" in evaluating the competitive effects of the sales commission contracts. Thus, the Commission itself said that the supposed need to examine the "competitive effects" was due entirely to its conclusion that Texaco not only had, but exercised, controlling economic power over its dealers without using coercive tactics. This conclusion was indeed the keystone of the Commission's ultimate decision, without which it cannot stand. That being true, our holding that there is not a substantial evidentiary basis in the record for the Commission's assumption that Texaco had and exercised coercive economic power causes its conclusion based thereon to collapse.

The Commission's sweeping order not only condemned the Texaco-Goodrich contract but also held illegal any sales commission arrangement between an oil marketing company and a TBA supplier. This either attributes to all such oil companies inherent controlling economic power over their dealers, or implies there is basic illegality in such arrangements. Our view is that, in any case, there must be substantial evidence on the whole record of the supposed economic power of the oil marketing company before a prohibiting order can be based upon it. As to the implication that sales commission agreements between oil companies and TBA suppliers are basically illegal regardless of their terms, we disagree. There is no reason to condemn such contracts unless they result in unfair competition. An oil marketing company's recommendation to its dealers that they purchase a particular line of TBA, even though it receives a

commission for doing so, is not incompatible with its primary business of selling petroleum products. The dealers, at least in the situation here involved, are quite free to accept or reject the recommendation, and to handle a different line if they think it would be more acceptable to their customers.

The Commission's broad order prohibited contracts for sponsorship of TBA sales to oil marketing company dealers only when the company receives compensation for the sponsorship. The vice found by the Commission in the arrangement seems therefore to be the payment of commissions. Yet the Commission adopted the findings of the examiner which described in detail the services performed by Texaco under its contract with Goodrich and also adopted his conclusion that

> "The consideration for the payment of a commission to Texas under the sales commission contract is based upon substantial services rendered by Texas in promoting the sale of Goodrich TBA to Texaco dealers and distributors."

We see nothing illegal or even unethical in the payment of commissions for such services, except in instances where an oil marketing company forces its dealers through coercive tactics or controlling economic power to buy the sponsored products. Neither of those influences was proved in this case, and it may not be presumed that either will exist in future similar situations.

After four years of preliminary investigation followed by eight years of litigation, including the remand for additional evidence said to have been necessary but never used, the Commission has not been able to show illegality in the Texaco-Goodrich contract of 1940. During that long period, the companies necessarily have devoted much time and money to their defense. Although the Commission must be allowed considerable leeway in developing a record, its efforts in this case—fruitless after a dozen years—have exceeded permissible limits and have had unreasonably harassing and oppressive effects upon the companies under attack. Because the Commission's drastic orders are not supported by the record as a whole and because of the undue protraction of the administrative process, we are of the opinion that this long drawn out proceeding should now be terminated. Accordingly, the order under review will be set aside, and the matter will be remanded to the Commission with instructions to dismiss the complaint.

It is so ordered.

WASHINGTON, Circuit Judge (concurring in part and dissenting in part):

I agree with the majority that Chairman Dixon's conduct disqualified him from participating in the Commission's order, and that the order must be set aside for that reason. I would not, however, dismiss the entire proceeding, either on the merits or because of the Commission's delays. I would remand for further consideration of the case by the Commission, without the participation of Chairman Dixon, and on a basis which I will outline later on.

I.

With reference to Chairman Dixon's conduct, I would add only this. Federal Trade Commissioners, like other adjudicators, are entitled to hold and express views on the laws they are charged with enforcing and applying. They "do not stand aloof on * * * chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do." [1] We do not equate impartiality with utter indifference. A judge does not deny litigants a fair hearing by sitting in a case "after he had expressed an opinion as to whether certain types of conduct were prohibited by law." [2] We do not expect a Trade Commissioner to be neutral on anti-monopoly policies.

A fair hearing is denied, however, if the administrative judge, prior to examining the evidence and findings, has indicated his belief that named individuals or firms are violating the statute, and the "guilt" or "innocence" of such parties depends on certain factual findings which are in dispute. Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality. Whether justice was in fact done is not the issue; an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness." [3] We must presume that a fair hearing was denied [4] if a disinterested observer would have reason to believe that

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[1] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

[2] *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, at 703, 68 S. Ct. 793, 92 L. Ed. 1010 (1948).

[3] *Amos Treat & Co. v. Securities and Exchange Commission*, 113 U.S. App. D.C. 100, 107, 306 F. 2d 260, 267 (1962).

[4] "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954).

the Commissioner had "in some measure adjudged the facts * * * of a particular case in advance of hearing it."[5]

Chairman Dixon's speech leaves a clear impression that his belief that petitioners had violated the Act was far stronger than the "reason to believe" which justifies the issuance of a complaint. Indeed, his speech suggests not only a substantial conviction that Texaco and Goodrich are violating the Act but an implied promise to support the petroleum retailers in their struggle against alleged abuses by their suppliers. An independent observer could fairly conclude that Chairman Dixon was in some measure pre-committed to a determination adverse to petitioners. We must therefore—at the least—vacate the Commission's order and remand to the Commission for a de novo consideration of the record and the arguments without the participation of Chairman Dixon.[6]

II. *The Absence of Reviewable Findings*

The Commission's decision consisted of an assertion that the "other evidence of record[7] amply supports the conclusions and the order of the Hearing Examiner. The legal principles relevant to this decision need not be reexamined here because they are set forth at length in the opinions of the Commission in Goodyear Tire & Rubber Co. * * * and Firestone Tire & Rubber Co. * * *"

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b) (1958), provides in part that all decisions "shall * * * include a statement of (1) findings and conclusions, as well as

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[5] *Gilligan, Will and Co. v. Securities and Exchange Commission*, 267 F. 2d 461, 469 (2d Cir. 1959). In that case the Securities and Exchange Commission, three days after commencing adjudicatory proceedings, had issued a press release, stating that the parties involved had violated the relevant Act. The Second Circuit, in dicta, strongly disapproved of the Commission's behavior, but held that petitioners had waived their right to object by failing to make a timely motion.

[6] *Federal Trade Commission v. Cement Institute*, *supra*, is to be distinguished on the grounds that (a) the disqualification of the entire Commission, which was there sought, would have effectively precluded any enforcement of the Act against the respondent (the "necessity doctrine") and (b) the opinion does not indicate that the Commissioners had expressed a focused bias against the respondent, rather a general "policy" bias against basing point systems.

[7] That is, exclusive of certain evidence adduced in the remand proceeding, which petitioners claimed was improperly admitted, and which the Commission in fact stated that it would not consider.

the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record * * *." Recently, the Supreme Court set aside an order of the Interstate Commerce Commission, partly on the ground that—

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice." [8]

The mere citation of earlier opinions does not provide a sufficient basis to understand and evaluate the Commission's decision on the facts of this case. There are a variety of facts and findings relied on by the Commission in the *Goodyear* and *Firestone* cases which cannot be readily assumed here. For example, on the issue of coercion, in *Goodyear* the Commission found that "Atlantic dealers have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored TBA." [9] In *Firestone* the Commission pointed to internal memoranda of the Shell Oil Company to support the conclusion of coercion. In both cases the Commission purported to make an examination of the competitive effects of the sales commission plan, saying, "Determination of illegality in this context requires an evaluation of competitive effects resulting from respondents' use of the sales commission method of distributing TBA," [10] and, in pursuing an alternative theory of a tie-in arrangement, purported to make findings on Atlantic's and Shell's economic power in the "tying" commodity.

Also to be noted is the fact that on the same day that the Commission decided *Goodyear* and *Firestone*—March 9, 1961—it considered this case, and did not affirm the findings of actual coercion but remanded to the Examiner for the taking of further evidence on "competitive effects":

> "[T]he record in this case does not contain sufficient *market data* to enable the Commission to assess the

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[8] *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 83 S. Ct. 239, 245, 9 L. Ed. 2d 207 (1962).

[9] 58 F.T.C. 309, 342 (1961).

[10] Firestone, 58 F.T.C. 371, 408 (1961); Goodyear, *supra*, at 355. *E.g.*, Shell accounted for about 5% of the total gasoline sold at retail in the United States in 1955, 58 F.T.C. at 407; Firestone accounted for 15.3% and Goodyear 21.4% of total replacement tire sales at consumer level in 1954. 58 F.T.C. at 409.

> competitive effects of the sales commission method of distributing TBA employed by these respondents."[11] [Emphasis supplied.]

On April 15, 1963, the Commission, reviewing the Hearing Examiner's remand decision, affirmed his conclusions of a statutory violation, even though it excluded from consideration any new evidence adduced on the remand, and cited the *Goodyear* and *Firestone* cases, even though the Commission had previously declined to find a violation on this record, when it remanded simultaneously with its formulation and application of legal theories in the companion cases. The one Commissioner who had participated in the earlier decisions and was on the Commission on April 15, 1963, dissented from the decision rendered on that date.

These considerations indicate, not that the evidence, as a whole, fails to support a finding of a Section 5 violation under a proper interpretation of that section, but that the Commission failed to perform its function of articulating the facts and spelling out its theories. The Commission's decision falls short of the standards required for judicial review, for we are unable to discern with a fair degree of certainty the facts or the theories relied on below.[12] Under the circumstances, we should express no opinion on the merits.

In my view, we should hold simply that a court must know why a Commission acted in order to fulfill the function of judicial review (*Secretary of Agriculture* v. *United States*, 347 U.S. 645, 74 S. Ct. 826, 98 L. Ed. 1015 (1954)), and that businessmen and other parties subject to administrative regulation are entitled to an explanation of their duties and obligations. Thus, even in the absence of the disqualification issue, we would—in my view—find it necessary to remand for a proper opinion. See *Radio Station KFH Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 164, 247 F. 2d 570 (1957).

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[11] In Goodyear and Firestone the Commission considered such "competitive effects" as division of markets between manufacturers, foreclosure of battery and accessory manufacturers, foreclosure of smaller tire manufacturers, restraint on expansion of smaller tire manufacturers' distribution systems, foreclosure of wholesalers, presumption in favor of wholesalers selling sponsored products, and the impact on wholesalers who also sell at retail.

[12] See, *e.g.*, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 67 S. Ct. 894, 91 L. Ed. 1102 (1947); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 532, 65 S. Ct. 749, 89 L. Ed. 1150 (1945).

For the reasons given, I would set aside the Commission's order but would pass neither on the merits nor on other issues argued by the parties. The Commission could then be required to produce a new opinion within a reasonable time, such as sixty days, meeting the standard for judicial review.

III.

Though, as I have indicated, I do not think we should pass on the merits, the majority has done so. Under the circumstances, I am constrained to say that in my view the majority's conclusion that the record does not contain sufficient evidence to support a finding of a Section 5 violation is very doubtful. The crucial failing, in the court's view, is the lack of evidence to establish that Texaco has sufficient economic power over its dealers to compel them to handle Goodrich tires exclusively. I submit that under the antitrust laws, Texaco's relationship to its dealers must probably be deemed inherently coercive. See, e.g., *Simpson v. Union Oil Company of California*, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964); *Standard Oil Company of California v. United States*, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (opinion for the Court per Frankfurter, J.), 323 (concurring opinion of Jackson, J.) (1949); *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, at 402, 73 S. Ct. 361, 97 L. Ed. 426 (1953) (Frankfurter, J., in dissent, explaining his opinion in Standard Stations, supra); *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1961); *United States v. Sun Oil Co.*, 176 F. Supp. 715, 719-23 (E. D. Pa. 1959); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956); *United States v. General Motors Corp.*, 121 F. 2d 376, 398 (7th Cir.), cert. denied, 314 U.S. 618, 62 S. Ct. 105 86 L. Ed. 497 (1941). See, also, the recent opinion of the Seventh Circuit in *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 331 F. 2d 394 (1964). See, generally, S. Rep. No. 2073, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956), U.S. Code Cong. and Adm. News 1956, p. 4596, relating to the Automobile Dealers Franchise Act, 70 STAT. 1125, 15 U.S.C. § 1221 et seq.

Evidence which might tend to show coercive power in this case includes (a) one year leases and sales agreements, terminable at the year's end upon 10 days' notice; (b) substantial contractual control by Texaco over the use, maintenance and ap-

pearance of stations (the obligations imposed by Texaco, in addition to being evidence of Texaco's bargaining power, are means by which Texaco could prematurely terminate the lease through enforcement of one of these obligations, under cancellation provisions); (c) high personal investments by the lessees in their stations; (d) close dealer supervision by Texaco salesmen; (e) Goodrich's manifest understanding that Texaco controls its dealers (e.g., Goodrich's books refer to the dealers as "oil company controlled dealers"); (f) testimony of competing TBA suppliers that Texaco dealers felt they risked reprisal if they did not carry sponsored TBA, and (g) testimony of former Texaco dealers of the existence of a pattern of coercive conduct throughout their tenure. Other evidence in the record that Texaco imposed a course of purchasing behavior on the dealers may be summarized by quoting from page 51 of Respondent's brief:

> "* * * the services performed by Texaco pursuant to its contracts include: Stressing the importance of TBA to *prospective* dealers and recommending BFG and Firestone; giving advance notice of dealer selection to BFG or Firestone and introducing new dealers to their salesmen; assisting new dealers with adequate TBA inventories; encouraging its salesmen to write sponsored TBA orders without awaiting formal dealer request; calling on dealers with BFG or Firestone salesmen ('double teaming'); conducting frequent dealer meetings and training courses, with active BFG and Firestone participation; arranging for and participating in BFG and Firestone advertising and promotions; and permitting sponsored TBA purchases on its credit cards. Texaco training schools are conducted at company-owned service stations where only BFG or Firestone TBA is used. This can only solidify the dealer's 'choice' of sponsored TBA."

Thus, I suggest that it may well be the record as a whole would support findings of both the existence and the utilization of coercive economic power by Texaco over its dealers. Were we reviewing the Hearing Examiner's findings, and formulating the appropriate legal theory in the first instance, I suggest that we might also properly conclude that there was sufficient evidence of anti-competitive effect to warrant finding a violation

under a tie-in theory.[13] But in the first instance it is the Commission, not this court, which must indicate what facts and what legal theories constrained it to find a violation. We could of course select those legal doctrines appearing in the cases cited in the Commission's opinion—*Goodyear* and *Firestone*—and those facts in the record before the Hearing Examiner, which would sustain the Commission's conclusions, and then affirm. But aside from the fact that such an approach would be less than faithful to the appropriate institutional relationship between this court and the Commission, it would not be possible in this case because of Chairman Dixon's disqualifying conduct.

The delays in this case are serious.[14] But I would not terminate the proceedings because of them. The public interest in effective competition should not lightly be subordinated to Texaco's interest in speedy adjudication.

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[13] On the appropriate test of anti-competitive effect necessary to sustain a finding that a tie-in violates Section 1 of the Sherman Act (which generally puts a more stringent burden on the Government than does Section 5 of the FTC Act), *see e.g., Northern Pacific Railway Co. v. United States*, 356 U.S. 1 at 5–6 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). The percentage of the gasoline station market for TBA controlled by Texaco, on any reading of the record, certainly affects a "not insubstantial" amount of interstate commerce. See *International Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947), and *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962).

On utilization of a tie-in theory under circumstances similar to those of the instant case, see *Osborn v. Sinclair Refining Co., supra*, 286 F. 2d 832 (4th Cir. 1961). The fact that Texaco's power and practices resulted in something less than exclusive dealer use of sponsored TBA would not seem to require a different result. *Id.* at 838–39. See, also, the decision of the Seventh Circuit, in an appeal from a parallel decision of the Federal Trade Commission relied on below, *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 331 F. 2d 394 (1964).

ORDER OF FEDERAL TRADE COMMISSION VACATING PRIOR DECISION AND ORDER AND SETTING HEARING ON REMAND

[9313] **(June 18, 1965)**

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

Docket No. 6485

In the Matter of

THE B. F. GOODRICH COMPANY

and

THE TEXAS COMPANY, CORPORATIONS

On June 7, 1965, the Supreme Court vacated the judgment of the Court of Appeals for the District of Columbia Circuit which had set aside the Commission's order to cease and desist entered in the above-captioned proceeding, and remanded the case to that court "with instructions to remand it immediately to the Federal Trade Commission for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n,* —— U.S. —— (1965)." Pursuant to the mandate of the Supreme Court, the Court of Appeals on June 16, 1965, remanded the case to the Commission.

In accordance with the directions of the Supreme Court and the Court of Appeals,

It is ordered that:

(1) The Commission's decision and order of April 15, 1963, in which Chairman Dixon participated, be, and it hereby is, vacated.

[9314] (2) The appeals from the hearing examiner's initial decision of September 24, 1962, are set down for oral argu-

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[14] See, generally, *Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings,* 72 YALE L. J. 574 (1963).

ment on July 8, 1965, at 2:00 p.m., in Room 532 of the Federal Trade Commission Building, Washington, D.C., with 45 minutes allowed for each side. All questions of law and fact presented by the appeals will be considered by the Commission on the basis of the entire record. The Commission suggests that the oral argument will be most useful if counsel focus on the question whether the facts of record in the present case bring it within the Supreme Court's decision in the *Atlantic Refining Co.* case.

(3) Both sides may submit supplemental briefs with respect to the issues involved in the appeals, provided that such briefs are filed no later than August 9, 1965.

By the Commission, Commissioners Dixon and MacIntyre not participating.

SEAL

JOSEPH W. SHEA,
Secretary.

Issued: June 18, 1965

ORAL ARGUMENT BEFORE FEDERAL TRADE COMMISSION

[9476] (July 8, 1965)

BEFORE THE

FEDERAL TRADE COMMISSION

Docket No. 6485

In the Matter of
THE B. F. GOODRICH COMPANY a corporation
and
TEXACO, INC. (formerly the Texas Company), a corporation

Room 532, Federal Trade Commission Building,
Sixth and Pennsylvania Avenue, N.W.
Washington, D.C.
July 8, 1965.

Met, pursuant to notice, at 3:00 p.m.

Before:

PHILIP ELMAN, Member
JOHN R. REILLY, Member
MARY GARDINER JONES, Member

Appearances:

MILTON HANDLER, Attorney for Respondent Texaco, Inc.,
EDGAR E. BARTON, Attorney for Respondent B. F. Goodrich Company,
PETER J. DIAS, Attorney for the Federal Trade Commission,

PROCEEDINGS

[9477] The Bailiff: The Honorable Commissioners of the Federal Trade Commission. The Commission is now in session.

Commissioner Elman: This is the oral argument on remand in Docket 6485, B. F. Goodrich Company and Texas Company, Inc.

The Commission has allowed one hour and fifteen minutes to each side.

Mr. Peter Dias is appearing for the Commission and Mr. Milton Handler and Mr. Edgar Barton are appearing for respondents.

Have you agreed on the division of time, Mr. Handler?

Mr. Handler: Yes, Your Honor. I am going to take 45 minutes, and Mr. Barton will take thirty.

Commissioner Elman: Well, you be your own timekeeper. You may proceed.

Oral Argument of Milton Handler on Behalf of Respondent Texaco, Inc.

Mr. Handler: May it please the Commission, in focusing on the question posed by Your Honor's order, I propose, first, to analyze the Supreme Court's ruling in Atlantic, with emphasis on its precise ratio decidendi, and then to review the pertinent facts of record in the present case, to show that they do not fall within the condemnatory rules laid down by the Supreme Court.

I wish to emphasize at the outset that not a single [9478] operative fact which resulted in the invalidation of the Atlantic-Goodyear sales commission plan has been proved against Texaco and Goodrich, from which it follows that these proceedings should be dismissed.

What is it that was held unlawful in Atlantic?

The Supreme Court took pains to make clear that it did not regard the sales commission plan as per se unlawful. Indeed, the Solicitor General expressly disclaimed on all [sic] argument that the government was contending for per se illegality.

The nub of the Court's decision is found in the pithy words of Mr. Justice Clark at page 14 of the slip opinion, and I quote:

> "It is the oil company's power and overt acts towards its outlets that outlaws the sales commission plan."

Before turning to the matter of relief, the Court provided a concise summary of its substantive ruling in these words, at page 13, the paragraph immediately preceding V:

> "The short of it is that Atlantic, with Goodyear's encouragement and assistance, has martialled its full economic power in a continuing campaign to force its dealers and wholesalers to buy Goodyear products. The

anticompetitive effects of this program are clear on the record."

If Your Honors please, the thrust of the Atlantic decision is that the coercive use of sales commission constitues an unfair method of competition where the seller possesses and [9479] exercises control economic power over its dealers to force them to buy the sponsored TBA with demonstrable anticompetitive effects.

Any conceivable doubt as to the scope of the Court's ruling is completely removed by part 5 of the opinion dealing with the matter of relief.

If the Court's substantive doctrine had been that sales commission agreements are per se unlawful, obviously there could be no question of the propriety of forbidding such plans, and there would be nothing to discuss regarding the scope of the order.

But the whole point of part 5 was to justify the breadth of the order precisely because it was not limited to the conduct held unlawful, to wit, the coercive use of the plan.

Atlantic had strenuously urged that the order should enjoin only the use of overt coercive tactics. This argument was rejected—not because noncoercive use of the plan was itself a violation of law—it was rejected because of a settled principle of administrative law that permits an agency to forbid lawful conduct which it deems necessary for effective relief.

Justice Clark makes this point abundantly clear on page 14 where he states, and I quote, "The Commission was of the opionion that to enjoin the use of overt coercive tactics was insufficient. We think it was justified in this conclusion. The long existence of the plan itself, coupled with the coercive acts practiced by the Atlantic Company pursuant to it, warranted [9480] a decision to require more." And I underscore the words "to require more."

When all you do is forbid the unlawful conduct, you obviously are not requiring more.

It is quite significant—and I do not know whether Your Honors are familiar with transcript of the oral argument before the United States Supreme Court—it is quite significant that on oral argument, when closely questioned by various members of the Supreme Court, Government counsel was explicit that the Government was not claiming the sales commission arrangement itself was inherently unlawful, that it was not asking the

Court to predicate illegality upon Atlantic's possession of coercive power, but rather upon its improper use of such power; and that such improper use consisted of the compulsion on a dealer to handle sponsored TBA against their will.

If I had the time, I could read the pertinent quotation, but if Your Honors do not have the transcript of the argument, we will make it available.

Substantiation of each and every one of these concessions that I have noted will be found on pages 72, 80, 52, 61 to 62, 82, 56, 58, 64 and 65 of the transcript of the oral argument before the Supreme Court.

In short, the Court was asked to find the Atlantic-Goodyear sales commission agreement unlawful because of the coercion, the improper use of coercive tactics, because of the [9481] improper exercise of Atlantic's economic power, and because of the anticompetitive effects which this resulted in. And that is what the Court did in holding the Atlantic-Goodyear sales commission plan unlawful. It held nothing more.

Now, if Your Honors please, the facts deemed controlling by the Supreme Court, and which are stressed in its opinion, fall under three main headings. One—coercion. Two—the possession and exercise of economic power over dealers to force them to purchase the sponsored TBA. Three—anticompetitive effect.

It is noteworthy that on each of these three categories of facts, there is a finding by either the Commission or the Court of appeals in our favor. What readily distinguishes Atlantic from this case is that the facts which were dispositive there were not proved here.

I invite Your Honors to read with me the Supreme Court's description of Atlantic's coercive tactics at page 8 of the slip opinion, the second full paragraph just above the Roman Numeral II.

> "The Commission stressed the evidence showing that 'Atlantic dealers have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored' tires, batteries and accessories. Indeed, some dealers lost their [9482] leases after being reported for not complying with the Goodyear sale program."

Each of these facts found against Atlantic is notably absent here. Far from advising dealers that their status as lessees would be in jeopardy if they did not buy substantial quantities of TBA, Texaco dealers were told exactly the opposite—namely, that they were free to handle any brands of TBA they desired—whereas Atlantic dealers suffered lease cancellations for not complying with the TBA program, no Texaco dealer ever lost his lease as the result of Texaco's TBA program. And contrasted with the effective policing by Atlantic to which Justice Clark refers at page 8 of his opinion, there has never been any finding that Texaco has at any time even attempted to police the TBA purchases of its dealers.

Commissioner Jones: What percentage, Mr. Handler, of the Texaco dealers use the sponsored TBA's?

Mr. Handler: 30 per cent of the dealers by number bought one dollar or more of the sponsored TBA. 20 per cent, by number, bought 1 dollar or more of the sponsored batteries. I propose to discuss that a little later.

Your Honors—

Commissioner Reilly: Mr. Handler, what about the conclusion of the Hearing Examiner—the conclusion of the Hearing Examiner to the effect that Texaco dealers did induce [9483] the purchase of sponsored TBA through coercion?

Mr. Handler: That finding was never affirmed by the prior Commissions that sat on this matter, and as I will demonstrate in a minute, the Court of Appeals, after scrutinizing this record, came to the conclusion that there is no substantial reliable or substantive evidence supporting that conclusion.

All I can say is that the Examiner was completely wrong.

Now, Your Honors, it is hardly a man bites dog type of argument for counsel bravely to proclaim that a record will not support a particular finding of fact. You are inured to hearing these assertions. But here you have more than my say so.

This record has been scrutinised by a reviewing court, and that court has held that coercion was not proved against the present respondent.

May I refer Your Honors to the following pages of the Circuit Court of Appeals' opinion, where the Court of Appeals holds, one, that the Commission did not find coercive tactics had been used, and that the record as a whole demonstrates the contrary—336 Fed 2d 754, at 762.

Two—that the use of coercive tactics was not proved in this case—page 763.

Three—that it is the announced policy of Texaco to respect the independence of the dealers, and, as the evidence overwhelmingly shows its practice has followed its policy—page 762.

[9484] In other words, the Circuit Court of Appeals was not relying merely upon a paper declaration of policy—it was relying upon the proofs in this record that the practice of Texaco matched its declared policy.

Four—that Texaco's dealers are quite free to accept or reject the recommendation and to handle a different line if they think it would be more acceptable to their customers. Page 763.

I could stop here on the issue of coercion, but there are additional facts which I believe you would want me to call to your attention.

Commissioner Elman: Mr. Handler, you are not arguing that we are precluded from finding that actual coercive tactics were used.

Mr. Handler: No. This record is before you, and you are free to make those findings comporting with the requirements of the Administrative Procedure Act, and the decisions of the courts—namely, the findings must be supported by reliable, substantial evidence, taking the record as a whole.

Commissioner Elman: But you recognize that the Supreme Court and the Commission itself have in effect wiped the slate clean, so far as the prior rulings are concerned—a majority of the Commission examining for the first time this record, de novo.

Mr. Handler: If Your Honor will permit me, may I [9485] restate what I said with a slight amendment. You are free, under the mandate of the Supreme Court, to the Circuit Court of Appeals, and the mandate of the Circuit Court of Appeals to you, to re-examine this record in light of the Atlantic case—to match, if you can, the facts against the rules laid down in that case, and if the facts do not support the condemnatory rules of the Supreme Court decision, you must dismiss. And I venture to believe and confidently assert that when you read this record you will find that there is no evidence here that would support a finding of coercion.

Now, let me bring to your attention three points on this

coercion matter in addition to the references that I made to the opinions of the Court of Appeals.

First—and I do not believe that you know about this, and hence I am taking the time to call it to your attention. Counsel for the Commission at the trial, at Joint Appendix 2353—that is the printed record—specifically disclaimed that he was charging respondents with coercion. This was towards the end of the trial. He solemnly asserted this to the Hearing Examiner.

Second—the Commission, on the first appeal, unlike what it did in Atlantic and Shell, did not make an explicit finding of coercion in this case. The findings, when you examine these three opinions, are quite different, and I think significantly so.

[9486] Third, there is one additional fact which I desire to advert to. Texaco has 38,000 dealers. If any of them had been required against his will to handle the sponsored TBA, there should have been no difficulty in obtaining such evidence. Not a single dealer was called to the stand to give such evidence. But respondents put plenty of dealers on who gave the contrary evidence—that they were not coerced and they were not required to handle the sponsored TBA, and they were entirely free to handle any products they saw fit.

Now, it is clear from this record that Commission counsel sent out questionnaires to determine whether the dealers were forced to handle Goodrich and Firestone TBA. How do we know this? We know this because a Texaco distributor received one such questionnaire. The questionnaire plus the distributor's answer was introduced into evidence by Texaco.

We moved for a disclosure of all the answers to the questionnaires, but the Examiner refused to make this information available to us.

I can readily understand why Commission counsel, being possessed of the facts negating coercion, expressly disclaimed before the Examiner any claim of coercion against Texaco. And I refer to that Joint Appendix, JAX 429, where Your Honors will find the text of the letter written by Commission counsel to various Texaco distributors and dealers—specifically asking them whether they were forced to handle TBA. And Your Honors [9487] know that if he had received favorable responses, he would put those respondents on the stand to give such testimony. This he did not do.

Now, the second factual area stressed in the Supreme Court's opinion is the possession and exercise of economic power over dealers to require them to purchase sponsored TBA.

Commissioner Elman: Mr. Handler, am I correct in thinking that as to your first point, about coercion, when you use the word "coercion" you are thinking of what the Supreme Court on page 10 of the slip opinion characterized as direct and overt threats of reprisal—that kind of coercion?

Mr. Handler: I mean coercion in the legal sense, yes.

Commissioner Elman: In a strict legal sense.

Mr. Handler: That is correct.

Commissioner Elman: Not the kind of utilization of coercive superior economic power that was expressed in the concurring opinion?

Mr. Handler: I will go further. I do not recognize any distinction between that which is coercive and that which is not coercive. But I do recognize that coercive tactics can be expressed and they can be implied. You can imply coercion from a course of conduct.

There is no evidence of any coercion, express or implied, or however you define it.

If, however, you want to say that persuasion is [9488] coercive, then you are misusing the word "coercive." And there is nothing here to support any finding of coercion, however defined, if defined correctly, without a distortion of the concept.

By coercion I mean forcing people to do something against their will. I don't care how you do it.

Commissioner Jones: By superior economic power, such as the Supreme Court refers to here?

Mr. Handler: However you do it. You sometimes can be coerced by somebody who has inferior power. But the mere fact that you have superior power does not mean that you are exercising it, and that you are coercing anybody.

The employer has superior economic power over his employee. Nobody would say that every minute of the work day that the worker is being coerced. That power has to be exercised in order to warrant a conclusion of coercion.

Commissioner Jones: You read the Supreme Court opinion as requiring active exercise.

Mr. Handler: Precisely.

Commissioner Jones: You do not read it as talking in terms of superior economic position.

Mr. Handler: Precisely. Not only that, but the Government counsel was specific in negating that he was attacking the existence of power in the abstract. He said it was the exercise, the use of the power that made it unlawful.

Commissioner Jones: Reading page 9 of the Supreme (9489) Court opinion, they are really talking about the relative economic positions, are they not?

Mr. Handler: Oh, yes. There are places where he notes a fact. But the thrust of the opinion is the way in which the power has been used.

Commissioner Jones: What part of the opinion is that?

Mr. Handler: Well, the passages that I have read to you before, on page 14, for example.

> "It is the oil company's power and overt acts towards its outlets that outlaws the sales commission plan."

Very explicit.

Commissioner Jones: He is discussing there the order, is he not?

Mr. Handler: He is explaining the ruling that is the predicate for the order.

Commissioner Jones: As I read the opinion on liability, he is talking about the economic power and leverage.

Mr. Handler: No. Page 13. "The short of it"—"The short of it is that Atlantic, with Goodyear's encouragement and assistance, has martialled its full economic power"—how?—"in a continuing campaign to force its dealers and wholesalers to buy Goodyear products."

That is exercising the power in a continuing campaign.

Commissioner Elman: When the Court refers to overt acts, it might very well have had in mind such things as the [9490] double teaming, merchandising tactics, and all the pressures and tactics that might be used in sponsoring the TBA short of threats and reprisals.

Mr. Handler: I said before you can have a congeries of facts, and you put them on the scale, and you ask yourself, does this add up to pressure, coercion, forcing people to act against their will.

We do not have double teaming here. As a mater of fact, if you take the Supreme Court opinion, and we will do this in our

brief—we will show in parallel columns how the facts found there differ from the facts here.

Now, I said that the second factual area stressed in the Supreme Court is the possession and the exercise of economic power over dealers to require them to purchase sponsored TBA.

Now, the factual distinctions between Atlantic and the Texaco records are no less significant than the differences respecting coercion. Let me cite three examples.

The Supreme Court found that the most impressive evidence of the effectiveness of its exercise of its economic power was the remarkable switch of Atlantic dealers to Goodyear TBA. An Atlantic survey between 1946 and 1949 showed that 67 per cent of its dealers preferred another brand of tires, and 76 per cent another brand of batteries. Yet in 1951, within seven months after the agreement, Goodyear had signed up 96 per cent and 98 per cent respectively of Atlantic's dealers, in two (9491) of the three areas assigned to it. I am quoting from page 8.

There could be no more compelling proof of the exercise of economic power than these statistics.

Now, what are the comparable statistics as far as Texaco is concerned? Only a third of Texaco dealers carry any sponsored tires, and about a fifth carry any sponsored batteries and accessories.

As the Examiner found, none of the Texaco stations is an exclusive dealer of TBA. All those selling TBA handle nonsponsored products.

Where there is a dramatic shift from one brand to another, to the extraordinary extent disclosed by the Atlantic statistics, particularly in the face of the expression of the contrary desires of the Atlantic dealers, it would plainly be unreasonable not to infer that Atlantic had exceeded the bounds of normal salesmanship and recommendation. Per contra, where after over 20 years of the sales commission arrangement only a third of the Texaco dealers are handling the popular and extensively advertised tires of two of the four largest tire companies in America, the inference is equally plain that recommendation is not tantamount to command.

Lest there be any misunderstanding, let me make it clear that we do not deny that Texaco's resources are vastly greater than those of its dealers or distributors. But under the decision of the Supreme Court, illegality does not rest on [9492] a mere disparity of economic strength. Rather it is the use of power to

force the dealers to handle unwanted goods that leads to illegality.

Now, my second example of the differences in the facts with respect to this power point comes from pages 7 and 10 of the slip opinion which explains why Atlantic was successful in compelling its dealers to purchase Goodyear TBA. And I quote:

"Goodyear also furnished, this time at the special request of Atlantic, a list of the letters from recalcitrant dealers who refused to be identified with the Goodyear program. These lists Atlantic forwarded to its district offices for appropriate action. On one occasion a list of 46 such dealers was furnished Atlantic officials by Goodyear. All soon fell in line. This is a particularly impressive example of Goodyear's inclination to use Atlantic's power for its own benefit."

Goodrich never furnished Texaco with any list of recalcitrant dealers. The crucial fact in this case is that Texaco dealers and distributors were not required to handle sponsored products and they ultimately and freely handled nonsponsored items without any interference whatsoever.

The third factual distinction to which I would like to refer is the Supreme Court's finding that Atlantic controlled all advertising on the premises of its dealers and permitted no signs or displays other than those of sponsored product.

Precisely the contrary is the situation here.

[9493] Texaco leases did not provide for any such control. Texaco never controlled the advertising. This record is replete with proofs of advertising by Texaco dealers of a host of nonsponsored products.

Now, I turn to the next indispensable factual element, competitive effect.

The Supreme Court notes on page 11 the Commission's finding that the activity of Goodyear and Atlantic impaired competition at the three levels of the tire, battery and accessory industry—manufacturing, wholesaling and retailing.

On the basis of this finding of adverse competitive effects, the Court concluded that the Atlantic program had been proven to be analogous to a tie-in, and therefore did not require Commission consideration of evidence of economic justification of the programs.

Integral to the Court's determination of illegality was the record proofs of adverse competitive facts in Atlantic.

Now, Your Honors will recall the striking differences between the Commission's original decision in our case and its rulings in Atlantic and Shell. And that difference was that in the latter two cases it found that the operation of the sales commission plans had serious anticompetitive effects—whereas it could make no such finding in the Texaco case because the record, the Commission pointed out, contains no such evidence of competitive effects.

[9494] Finding this record insufficient, the case was remanded for further evidence on the competitive effects of Texaco sales commission agreements upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels.

Your Honors are aware that no additional evidence on competitive effects was adduced on the remand. The self-same record which the Commission found deficient on this issue in its first opinion is before you today, and it is just as lacking in proof of anticompetitive effect now as it was then.

Now, in Atlantic the Supreme Court found a classic division of markets between Goodyear and Firestone. This does not exist here.

In Atlantic, the Supreme Court found that Atlantic dealers were required to buy from a specified supplier point. We have precisely the contrary finding here by the Examiner.

There was full line forcing in Atlantic, and this shut the possibility of the small manufacturer selling the multiplicity of other items known as accessories through Atlantic dealers. There is no such thing here.

Finally, there was the foreclosure in Atlantic, whereas here—

Commissioner Jones: Excuse me, Mr. Handler. I do not understand your full line forcing point. What was the situation in Atlantic?

[9495] Mr. Handler: In Atlantic it was found that Goodyear had refused to sell tires and batteries to Atlantic dealers unless Atlantic agreed that they would buy the full line of accessories as well. And this foreclosed the manufacturers. You do not have that here. Contrary to the finding of foreclosure in Atlantic that the wholesale—in Atlantic at the wholesale and retail level, here we have a specific finding affirmed by the Court of Appeals that the dealers were free to buy any product, any item they saw fit.

Commissioner Jones: That might go to accessories. That would not have anything to do with tires and batteries.

Mr. Handler: It goes to everything here. The finding is very clear.

Commissioner Jones: Suppose there wasn't any full line forcing. How does that affect whether in fact this contract has a coercive or anticompetitive effect?

Mr. Handler: Where there was full line forcing, you eliminated Atlantic outlets from purchasers of the various accessories. You do not have that here. Therefore the Commission found in the first decision that there had been foreclosure of the small manufacturer. This you do not have here.

If Your Honors please, the time is past where mere rhetoric and unsupported contention can substitute for proven fact.

It behooves counsel supporting the complaint, if he [9496] claims that the Supreme Court invalidated the sales commission plan as a matter of law, to cite supporting chapter and verse in the opinion of the Supreme Court. If he contends that mere salesmanship and recommendation on the part of a large oil company is unlawful, again it is up to him to point specifically to any part of the Supreme Court opinion which provides any aid or comfort for that view.

If he claims that this record will support findings of coercion, misuse of economic power, and anticompetitive effect, it is up to him to demonstrate that the Court of Appeals was in error on the first two of these indispensable elements, and that the original Commission panel was in error on the third.

If he says that Texaco imposed tie-in requirements on its dealers and distributors, let him point to the specific evidence on which he relies and which he claims was ignored by the Commission and the Court.

If he speaks metaphorically of Texaco's having farmed out its putative economic power to Goodrich and Firestone, let him put before you the facts as distinguished from the purple words.

If he asserts that recommendation is tantamount to command, let him refer to the substantiating data on which he relies, conforming here as well as on all the other disputed questions of fact to the familiar and settled requirements of Universal Camera.

[9497a] It is our submission that there is lacking here the three indispensable indicia of illegality under the Atlantic ruling—

no coercion, no improper exercise of power, and no anticompetitive effects.

In light of this signal failure of proof, this long pending litigation should be brought to an end by the dismissal of the complaint against Texaco and Goodrich.

According to the clock before me, Your Honors, I think I have eight minutes of my 45 for rebuttal.

Thank you very much.

Commissioner Elman: Mr Barton

Oral Argument of Edgar E. Barton,

On Behalf of Respondent B. F. Goodrich Company

Mr. Barton: If it please the Commission, I believe Professor Handler has demonstrated that the Supreme Court approved the Commission's order against Atlantic on the ground that Atlantic as a matter of massive record of proof, and indeed by its own concession, implemented its sales commission arrangements with Goodyear by coercively forcing its dealers to handle sponsored TBA. The Court relied upon coercion, not only to justify the broad remedy, but also, I submit, to define the wrong.

He has also demonstrated, I submit, that this record wholly fails to prove any such coercion by Texaco.

The predicate for the Supreme Court's upholding the order against Goodyear is similarly lacking here, and therefore [9497b] dismissal as to B. F. Goodrich is required.

Commissioner Jones: Mr. Barton, may I interrupt just a moment on this point of coercion, again. The Court relies fairly heavily on its Simpson opinion, Union Oil. And there, as I understand it, the coercive tactic was primarily existence of the lease.

Now, isn't it true that this is the same kind of coercion that the Supreme Court had in mind when it talked about Atlantic?

Mr. Barton: I think, Commissioner Jones, you have to consider that the background of the Atlantic case was that there was this vast switch-over of dealers from the Lee tires to the Goodyear tires within a period of some three months after the dealers had indicated by questionnaire before that they wanted the Lee tires.

Now, there was—nothing else could explain that, other than coercion. And that record was rampant with active overcoercion on the part of Atlantic, in which Goodyear participated to force the dealers to switch from Lee tires to Goodyear tires.

That was the vast overhanging fact of coercion that was behind the Atlantic decision.

Now, I agree with you. They referred—and that opinion is not the clearest opinion that was ever written by Justice Clark, I must say—that refers to the Simpson case. But the fact that is central to that decision is that switchover [9498] from Lee tires to Goodyear tires within a period of 90 days.

Now, there is no such fact here.

This record is absolutely barren of any evidence of coercion on the part of Texaco and is completely barren of any participation by Goodrich in coercion by Texaco.

In essence, in Atlantic the Court held that Goodyear necessarily knew, actively solicited and participated in Atlantic's coercion of its dealers. In the words of the majority opinion, at 1509, "So close was the team work of the two companies, that even with blinders on Goodyear could not have been ignorant of Atlantic's practices."

Again, at 1508—"Goodyear was no silent or inactive partner in the implementation of the sales commission plan. It did not simply sit back and passively accept whatever benefits might accrue to it from the Atlantic contract."

Again, "There was abundant evidence that Atlantic in some instances with the aid of Goodyear not only exerted the persuasion that is a natural incidence of its economic power, but coupled with its direct and overt threats of reprisal." That is 1506.

Again, at 1507—"The short of it is that Atlantic, with Goodyear's encouragement and assistance, has martialled its full economic power in a continuing campaign to force its dealers and wholesalers to buy Goodyear products."

Now, simply stated, the Court concluded that Goodyear [9499] aided and abetted Atlantic in its transgression, and that such a demonstrated propensity for harnessing and utilizing—those are the Court's words—Atlantic's powers and overt acts justified a broad order outlying Goodyear's further use of sales commission plans.

Here Texaco has not been a transgressor, and a fortiori, B. F. Goodrich cannot be an aider and abettor.

The facts of record fully support and buttress the logic of that conclusion.

First, let us examine the question of what Goodyear paid commissions for and what B. F. Goodrich pays commissions for.

Upon examination of the Atlantic record, the Court concluded that Goodyear paid Atlantic for the exercise of its economic power, coupled with "direct and overt threats of reprisal," 1506.

The record there compelled that conclusion, and Goodyear did not even offer testimony to the contrary.

The record in our case, even wholly apart from the absence of coercion by Texaco affirmatively, proves that B. F. Goodrich pays only for wholly legitimate services by Texaco, and the character of those services, together with the fact that they are absolutely essential to service station dealers, establishes the competitive and economic justification for B. F. Goodrich sales commission arrangements with Texaco and other [9500] oil companies.

Commissioner Jones: Let me ask you another question.

Is it your position that this Commission should find that the coercion here, to use your words, flowed from the economic relationship of Texaco with the service station—that as the other party of the contract, you would still not be involved in that?

Mr. Barton: I don't think, Your Honor, that there is evidence from which the Commission can find that what legally constitutes coercion flows from the relationship between Texaco and its dealers.

The facts of coercion—I want to get to that specifically—there is an absolute absence of any kind of coercion flowing from that relationship.

Commissioner Jones: So you would ignore your contract and say that this Commission must find acts of coercion by Texaco to hold Texaco, and acts of coercion by you to hold you, and you would ignore—

Mr. Barton: No. If you found in Atlantic that there was actual coercion by the oil company, in which the tire comany participated or knew of and reaped the benefit of, I take it there would be grounds for holding the tire company under the Atlantic decision. But here there are no facts upon which to base that finding of coercion by Atlantic—by Texaco. And there being no facts on which to base coercion by Texaco, there is no basis [9501] B. F. Goodrich, either.

I want to go down the list of the things which constituted coercion in Atlantic, which are not present here.

Commissioner Jones: You really stand and fall with Texaco here, then, don't you?

Mr. Barton: I think under the Atlantic decision that is true—except insofar as the Texaco contract itself is concerned, Texaco's relationship—not necessarily insofar as the other oil companies whom B. F. Goodrich has sales commission arrangements with, as to which there are no facts of record in this case.

Commissioner Elman: Aren't you also telling us that your case stands or falls depending upon whether the Commission finds in this record the same kind of crude, primitive acts of coercion which you say were used by Atlantic?

Mr. Barton: No, I am not saying that. I am not saying that you have to find the same thing. But if you examine the record and find none of the things—

Commissioner Elman: Then you say—correct me if I am wrong—as I understand your argument, and Mr. Handler's, it is that the Supreme Court decision in the Atlantic case has as a sine qua non the presence in that record of these acts of coercion found against Atlantic as to which it did not appeal, and that if we do not find in this record the same kind of blackmailing threats and so on—"If you don't buy this TBA [9502] that we sponsor, we will cut you off, we will do all kinds of terrible things to you,"—if we do not find that in this record, you and Mr. Handler are arguing that we should dismiss the complaint.

Mr. Barton: Commissioner Elman, I take it that it is a settled principle of law, supported by the Supreme Court, where it said, that a sales commission plan is not illegal per se.

If it had been the rule that they were holding that a sales commission plan was illegal per se, none of that part of Justice Clark's opinion about coercion would have been in any way relevant to his conclusion.

Now, I submit that what the Supreme Court decision means in effect is that, as in many other fields of the law, a perfectly reasonable business practice can be forbidden if it is misused. I think that is the explanation of the Atlantic decision.

Commissioner Elman: You seem to be saying—and again, if I am wrong correct me—that we have to hold sales commission plans to be illegal per se if we hold that in this case there is such an inequality of bargaining power, such evidence of inequality in the relationships of the parties, that the sales commission plan would have an adverse competitive effect. That is not saying anything is illegal per se.

Mr. Barton: I think in the state of this record, where [9503] not only is coercion unproved, but the lack of coercion is affirmatively proved by—if you read the record, go through the

record line by line, page by page, and read the paucity of evidence put in by counsel in support of the complaint, in support of any kind of coercion, and analyze that testimony critically, and do not accept it willy-nilly, and then read the evidence of the 59 dealers who were called by respondents to testify what influenced them in their buying of TBA—if you look at the hundreds of pages of pictures of nonsponsored TBA in the dealers' premises of leased Texaco stations, you cannot arrive at any other conclusion than that the fact of noncoercion is proved by the respondents here.

Now, therefore I say to you, Commissioner Elman, that if you hold that there is a violation here by this sales commission arrangement, you will be in effect holding the sales commission plan is illegal per se—a proposition, I submit to you, which is not supported by the Supreme Court decision and is entirely inconsistent with the Atlantic Supreme Court decision, as is, I think, demonstrated by reading both the majority opinion and the dissenting opinion.

Now, the reason for that is this.

These sales commission plans do provide a necessary service to the retail dealer. Service stations require a comprehensive, integrated and continuing program of TBA counsel and training. Individual or small marketers, up against severe [9504] competition from specialized—Sears and Roebuck Stores, big discount chains, and traditional tire dealers—the service stations and the dealers are traditionally and often inexperienced in the many ramifications of tire marketing, and they cannot devote their entire time to it. They require continuous training, advice and assistance.

To illustrate, they need help in connection with inventory control in order to minimize investment, they need help in connection with installation and service, adjustments, trade-ins, familiarity with competitive prices and products, and a host of other factors necessary to effective TBA merchandising.

All of this help must cover literally dozens of items that are included in a TBA line.

But B. F. Goodrich and its independent wholesalers and supply points and their competitors do not and cannot furnish that kind of assistance to the dealer. The sales organization of B. F. Goodrich is geared to selling to large volume TBA outlets.

After selling the B. F. Goodrich nonexclusive franchise to a retail dealer, B. F. Goodrich salesmen can only call on him once or twice a year, only occasionally.

The B. F. Goodrich supply point, like B. F. Goodrich, deal primarily with large accounts—not with the dealer, small dealers.

So far as service stations, these wholesalers spend [9505] their time in solicitation of orders, service in connection with adjustments and repairs, and quick deliveries at all hours of the small pickup orders called in by stations for TBA items not in stock but requested by a motorist.

Since their visits to the station are essentially confined to order taking, the B. F. Goodrich supply point, like other wholesalers, do not furnish the training and merchandising services and assistance essentially to make service stations viable, successful TBA outlets.

Commissioner Jones: What is the connection between the service station's need for these kind of services and the designation of a particular supplier of these products?

Mr. Barton: We do not do that, as in Atlantic.

Commissioner Jones: No, no. But you are making the argument, as I understand your argument, that somehow because the service station needs inventory assistance and so forth—

Mr. Barton: That is right.

Commissioner Jones: —you cannot supply that. Therefore the conclusion is—

Mr. Barton: My point, Commissioner Jones, is that because the service station dealer needs these kind of services in order to be an effective TBA marketer, and because neither B. F. Goodrich nor its distributors who service that dealer can supply those services, it needs the assistance of the Texaco Company whose salesmen call on that dealer every week to help [9506] them to merchandise the product.

Now, that is what we pay the sales commission for. We do not pay—B. F. Goodrich does not pay Texaco a sales commission for delivering captive dealers to it as in Atlantic—as the Commission found, as the Court of Appeals found, as the Supreme Court referred to. We pay Texaco for perfectly reasonable, acceptable, permissible services. And under those circumstances, we—where we are paying for something that is perfectly reasonable and permissible, and Atlantic was paying for something that was reprehensible, there is no basis for this

Commission to say that this case is consistent with the Atlantic case, and therefore that an order should be entered here.

As the Court of Appeals, looking at this whole record, studying it in detail, said, there is no evidence to support the Commission's conclusion that the conduct found here, in this record, violates Section 5 of the Federal Trade Commission Act.

There is nothing in this record consistent with what was found in the Atlantic record which led the Supreme Court, the majority of the Supreme Court, to find a violation there.

Now, as I was saying, the oil companies are the logical agencies to furnish this essential continuing dealer training. Their self-interest lies in building strong dealers. They recognize the dealer's need for the additional income from TBA and its integral role in promotion of greater sales of gasoline.

Further, they recognize that if the dealers are to [9507] survive as TBA outlets, they must have this continuing help.

Commissioner Jones: Prior to these contracts, did you sell service stations?

Mr. Barton: Did our—prior to these contracts, the evidence of record is that when the oil company is not interested in TBA—in Chicago, Mr. Chanisen, one of the complaining witnesses, was on the stand. His testimony indicated that before there was a sales commission plan with Conoco in the Chicago area, the Conoco stations were not interested in TBA, did not handle TBA, simply handled gasoline.

In other words, these plans, these sales commission plans have now been in effect for 30 years. Over that period of 30 years, as Mr. Handler pointed out, less than a third of the Texaco stations handled on the basis of buying one dollar or more a month sponsored products.

This plan has been of benefit to the service station dealers, to Texaco, and the B. F. Goodrich Company. It has not been any kind of anticompetitive effect on anybody else. It is a perfectly normal, reasonable business relationship, so long as it is not abused. And of course any kind of people can abuse fair trade and be forbidden to use it. They can abuse any perfectly normal business activity and be forbidden to use it for misuse of it.

But where as here you do not find that misuse, there is no basis for holding that it should be forbidden.

[9508] Commissioner Elman: You are saying that the services that Texaco renders to its dealers, such as inventory assist-

ance and so on, are the kind of services that wholesalers render to retailers, and they ought to be compensated on that basis?

Mr. Barton: I am saying that they are the kind of services that the wholesalers do not have time to provide to the small service station dealers.

Commissioner Elman: The Goodrich wholesaler could not do that.

Mr. Barton: That is true.

Commissioner Elman: If a small service station dealer were now to buy from a Goodrich wholesaler rather than from Texaco, he could not get these services?

Mr. Barton: That is true.

Commissioner Elman: Why is that?

Mr. Barton: Because there are so many of them—the salesman of the wholesaler does not have the [time to] spend with the dealer to give those services. The Texaco salesmen come into the station—

Commissioner Jones: He is going to do it anyway, though, isn't he—the Texaco salesman? Texaco is going to do this for the dealers regardless of the sales commission plan or not.

Mr. Barton: Well, no, I do not know what the consequence of your holding that a perfectly reasonable business relationship has to be terminated is going to be. I do not have [9509] a crystal ball from which I can determine what will happen after that.

But what I am referring to is that these kinds of services that are given us by Texaco are not kinds of services that are found in Atlantic to be paid for by Goodyear—

Commissioner Jones: Atlantic did not give these kind of services?

Mr. Barton: Sure; but they did a lot more. I don't argue with you. If Texaco were found here to have done the kind of coercion, in addition to providing these services, that Atlantic was found to be doing, then an order would enter here, under the Supreme Court ruling.

Commissioner Jones: You claim Atlantic paid for coercion?

Mr. Barton: I claim Goodyear paid for these services plus the coercion which Atlantic was found to have engaged in and Goodyear was found to have participated in.

Commissioner Jones: We would all need a crystal ball to decide that one, I suppose.

Mr. Barton: Yes, I think so. But in this connection the oil companies incur substantial expenses in giving these services. The record here shows that Texaco's direct expenses, excluding such expenses as furnishing the station, TBA space and facilities, and use of credit cards, runs about 70 percent of the total commission. Texaco salesmen devote 15 percent of [9510] their time to these services. As I say, this is what B. F. Goodrich pays for. It is what it intends to pay for and what it does pay for. It does not pay for delivery of captive dealers to it in contradistinction to the situation in Atlantic where the Supreme Court said at 1509, "The Commission was well justified in concluding that Goodyear had in effect purchased a captive market."

The Court there repeatedly emphasized that almost 100 per cent of Atlantic's dealers signed up with Goodyear within seven months of the time that Atlantic switched. I have referred to that fact.

Commissioner Elman: If that is the crucial thing, whether it is a captive market, what difference does it make whether the captive is a coerced one or not, as long as it is captive?

Mr. Barton: Well, it was found to be captive in Atlantic because it was coerced. If you do not have coercion, there is no basis for finding it.

Commissioner Elman: You can have a captive who is not coerced.

Mr. Barton: Pardon?

Commissioner Elman: You can have a captive who is not coerced.

Mr. Barton: How can you find that there is a captive market here when only 30 per cent of the dealers handle any of [9511] the sponsored product? That was not the situation in Atlantic. All of them handled sponsored product. Part of them handled Goodyear in the territory assigned to Goodyear, and part of them handled Firestone in the territory assigned to Firestone.

Commissioner Elman: People are very frequently captives because of the situation in which they find themselves rather than because somebody is hitting them over the head. You have a captive audience right now.

Mr. Barton: That same kind of situation was in Texaco. There was no captive audience in any kind of a real sense, as in Atlantic.

Now, the record here demonstrates that it is not Texaco, but rather B. F. Goodrich and its wholesalers who sell the B. F. Goodrich franchise.

We had a hearing in Atlanta. Down there, there were seven dealers signed up in a six-month period before the date of the hearing.

In that, we analyzed in detail the conditions under which they signed up. Six out of the seven were found by Goodrich and signed up without any prior notification from Texaco. Only one had been—had indicated he wanted to handle Goodrich, and Texaco forwarded the name to them.

The fact of the matter is that because Texaco has both Firestone and Goodrich, they do not notify the tire companies of a new station opening.

[9512] The tire company has to go out and get its own. Once it gets the dealer, then it pays Texaco for the services—perfectly legitimate services which it renders.

Commissioner Jones: You said some of these small stations did not want TBA. This 30 per cent figure—is that 30 per cent of all the stations or all the stations handling TBA?

Mr. Barton: I did not say the smaller stations did not want TBA. I said that when there is not a TBA program by the oil company, the dealers do not have the know-how as to how to handle TBA. 30 per cent is of all Texaco stations, excluding some 8,000 of the dealers who bought from consignees. But the 30 per cent figure is solid in the record, and I do not think there can be any question of it.

Commissioner Jones: Does the record show whether all the 70 per cent handle TBA of other people?

Mr. Barton: The record shows that they do not handle TBA, sponsored TBA, and they do handle TBA.

Now, there is no evidence here of double teaming. Counsel has been unable to demonstrate to you that there was any double teaming as was found in Atlantic. The Examiner rejected contentions as to double teaming, even when characterized by counsel supporting the complaint as occasional.

Commissioner Reilly: Mr. Barton, what was the relationship between Goodrich and Texaco prior to the consignment [9513] agreements?

Mr. Barton: I don't know. It was so long ago I don't think the record shows.

Commissioner Reilly: Is there anything in the record as to why Goodrich entered into this agreement?

Mr. Barton: Yes, I think there is quite a bit. Mr. Heban's testimony was quite explicit on that—that this was a method of distributing tires through service stations which made business sense; if the tire company received services from the oil company of a perfectly legitimate nature which it paid—to pay the 10 per cent commission for. And that was the reason that it was undertaken.

Commissioner Reilly: So in a business sense, it has been advantageous to Goodrich to be under this type of an arrangement?

Mr. Barton: Certainly. Otherwise they would not pay the 10 per cent.

Commissioner Reilly: Is there anything in the record to indicate there was a purchase resale agreement with Texaco prior to the consignment?

Mr. Barton: No, there is not.

Now—

[9514] Commissioner Elman: To what extent was this an exclusive agreement?

Mr. Barton: Pardon?

Commissioner Elman: To what extent did the contract between Texaco and Goodrich provide for exclusivity?

Mr. Barton: No provision for exclusivity whatsoever.

Commissioner Elman: Texaco could have made the same agreement with Goodyear the next day?

Mr. Barton: And in fact did. In fact they made the same agreement with Firestone, and in 1956 made the same agreement with U.S. Rubber.

Commissioner Jones: Different territories?

Mr. Barton: No, the same territory.

Commissioner Jones: In other words, the Texaco—did the Texaco dealers have a choice of three different types of companies?

Mr. Barton: Or any tire company. They had a choice of any tire company that they wanted, any wholesaler they wanted to do business with. Texaco received sales commission if they bought from a Firestone outlet or a B. F. Goodrich outlet or U.S. Rubber outlet.

Commissioner Jones: Texaco salesmen received commissions?

Mr. Barton: Texaco got the sales commission from the tire company if they bought from any one of those outlets of any one of those tire companies.

Commissioner Elman: These are only three lines of TBA that Texaco sponsored?

[9515] Mr. Barton: So far as this record is concerned, that is true.

Commissioner Elman: What were the percentages of those three?

Mr. Barton: Do you mean—

Commissioner Elman: Goodrich had 30 per cent.

Mr. Barton: No, no. Goodrich did not. The 30 per cent figure is all sponsored lines.

Commissioner Jones: What is in the record about the Texaco salesmen? Do they get a commission?

Mr. Barton: No, the Texaco salesmen do not get the commission. The commission is paid by the tire company to the oil company for the services rendered by the Texaco salesmen given in connection with the oil company's outlets.

Commissioner Jones: Is that earmarked to the salesman in some way?

Mr. Barton: No, it is not. I am sure it is not.

Commissioner Jones: Wasn't it true in Atlantic it was?

Mr. Barton: That I am not sure of.

Commissioner Reilly: Mr. Barton, let's go back to that 30 per cent a minute. I am not sure I am clear.

Goodrich sold 30 per cent of the three sponsored—

Mr. Barton: No.

Commissioner Reilly: Goodrich sold 30 per cent of what?

[9516] Mr. Barton: The 30 per cent figure is that of all of the Texaco outlets, only 30 per cent of them bought any sponsored products more than a dollar in a given month.

Commissioner Reilly: Now, of the Texaco stations which bought sponsored products, how much of that was sold by Goodrich?

Mr. Barton: Well, there is no—you mean of particular service stations?

Commissioner Reilly: No. What is the percentage of the sponsored products sold by Goodrich? You said there were three.

Mr. Barton: I here do not know the answer to that. We will have that in the brief.

Commissioner Reilly: All right. Do you know what percentage of TBA sold by Texaco was sponsored?

Mr. Barton: What percentage——

Commissioner Reilly: What percentage—assuming that the station sold a certain percentage of TBA, how much of that was sponsored as opposed to unsponsored?

Mr. Barton: Well, the record has some figures in it that less than a majority of the TBA sold by Texaco service stations, much less, is sponsored.

Commissioner Elman: Is there a finding on all of this by the Examiner, as to the percentages?

Mr. Barton: No.

[9517] Commissioner Elman: He did not——

Mr. Barton: This is in the record, that the Examiner did not make findings on it.

Commissioner Elman: You might be very helpful to the Commission when you get around to writing your briefs if you document all this.

Mr. Barton: We will be very specific on it.

Now, the Supreme Court pointed to the fact that Goodyear furnished Atlantic with detailed reports from which Atlantic could determine the exact amount of sponsored products purchased by each Atlantic retail outlet.

Commissioner Elman: You have about one minute left, Mr. Barton.

Mr. Barton: All right.

I want to end up with this.

It is perfectly clear on the record that the same kind of anything similar to the activities found in Atlantic are not present here. Under those circumstances, this complaint should be dismissed—after some ten years—against both Texaco and Goodrich.

Commissioner Elman: You are not suggesting that all these practices have been abandoned or anything like that, have you?

Mr. Barton: I am suggesting that there is a sales commission plan and it is perfectly a reasonable business relationship [9518] if it is not misused, as it was in Atlantic, and under those circumstances, the complaint should be dismissed.

Commissioner Elman: But the case is not stale in the sense that the practices to which it relates have long been discontinued or anything like that.

Mr. Barton: If you mean that the sales commission plan has been discontinued, the answer is no.

Commissioner Elman: All right.

Oral Argument of Peter J. Dias, on Behalf of the Federal Trade Commission

Mr. Dias: If the Commission please, it seems that maybe memories have dimmed over the years as to what the facts of this record actually show.

To start with, I am in rather an unenviable position of telling you, as I hate to do, that exactly what you, Mr. Elman, pointed out is the same thesis that I have pushed in this case from its inception, and that is to say it has never been contended that you had to have this, as you put it, crude, primitive coercion. Truthfully, I thought that that particular ghost had been laid to rest in my reply brief, reply to respondents' proposed findings when, as a grasping at straws, they claimed that I apparently misled them by saying that I did not claim there was coercion in this case.

I won't take too much time on it because—I will certainly have it in my brief to you. But the record is definitely [9519] clear that before these hearings started, prehearing conferences, and after they had started, long before they had continued, I made it perfectly clear that if coercion was found, if overt coercion was found, that the complaint in this case would certainly cover it. But it has always been my position that we were not claiming the overt, crude type of coercion. And on the very last day of hearings—I think it was December 10th, 1958—I probably did put my foot in my mouth when I stated that "I certainly do not agree that there was ever any contention that there is coercion in this case."

I certainly should have said overt coercion. I thought that had been explained, but apparently there is still a glimmer of hope in respondents' eyes on that one.

Commissioner Elman: When you say coercion or overt coercion you mean the kind of direct and overt threats of reprisal that the Supreme Court referred to on page 10 of the slip opinion, in the Atlantic opinion?

Mr. Dias: I would like to go back, if I may, to the opinion of the Seventh Circuit.

Now, that in my opinion states precisely—

Commissioner Jones: This case or the Atlantic case?

Mr. Dias: This will be the Seventh Circuit's opinion in the Goodyear-Atlantic case. I am sorry I only have a slip opinion—

I do not have the exact citation. But at page 13—"Atlantic contended that its influence over its dealers to purchase [9520] sponsored TBA short of force, threat or intimidation is lawful, that it may recommend high quality TBA to its dealers, and that such action serves a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealer's economic dependency upon the oil company. In that setting, recommendation is tantamount to command. Overt practices are as efficient as overt action. And sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as expressed covenants and open threats."

Commissioner Jones: What are the facts in this record, counsel? What are you relying on?

Mr. Dias: I am relying on the Seventh Circuit finding that the heart of this case, and the corresponding finding by the Supreme Court, that the source of leverage, and also listed as additional source of leverage, of a lease and sales agreement.

Under those agreements, Texaco retains—the leases are for one year, and they contain the normal housekeeping—I should not say normal—they contain housekeeping, equipment load, and alteration privileges.

In my opinion, and I think it has been found by the Supreme Court in the Simpson case, those are the—as they have said, the heart of the case.

Under the circumstances of those lease arrangements, the dealer was certainly bound and tied to Texaco and subject completely to Texaco's activities or demands.

[9521] Commissioner Jones: Well, assume that, counsel. What is in the record on what Texaco did to "recommend" the use of sponsored TBA?

Mr. Dias: Well, I think the Seventh Circuit also talked in terms of—or it was the Supreme Court, actually, that talked in terms, or confirmed the Seventh Circuit's findings as to the components of the sales-commission system. And that consisted of advance notice, training school, double teaming, reporting techniques, minimum inventory, advertising assistance, and the restriction of credit cards to sponsored TBA.

Commissioner Jones: I think I do not make myself clear. Are you talking now of Texaco or Atlantic?

Mr. Dias: Well—in the Goodyear-Atlantic case——

Commissioner Jones: I want to know about Texaco.

Mr. Dias: Yes, ma'am. I pointed out the components of the sales commission plan that both the Supreme Court and the Seventh Circuit found existed in the Atlantic-Goodyear situation, and I am saying to you now that the same situation and the same factors exist in this case. I might mention that in preparing this, I have compared the facts in the Atlantic-Goodyear case with the facts in the Texaco-Goodrich case, and where I refer to the facts found by the Court, or the indiciae of this economic power in the Goodyear-Atlantic case, I am saying to you now that I will duplicate that by reference to facts in the Texaco-Goodrich case.

[9522] Commissioner Reilly: Well, even though you said that you did not base your case on any overt coercion, you did present evidence, did you not, that some dealers testified that they had been pressured.

Mr. Dias: I am satisfied of that, yes, sir. As I say, we have not agreed all through this thing. But I think I can convince you that there is overt coercion in this.

Let's take the very first item which the Courts considered to be the components of the sales commission system, and that is the advance notice.

Now, this may not be the crude, overt type, but it is the subtle, plodding type of coercive activity.

Under the advance notice, when a dealer applies for a station, and before he moves into it, the Texaco people advise him that Goodrich and Firestone have fine products, and he would be well advised to stock his station with one or the other of those products. They convince him that a service station operator just cannot exist without TBA. The usual cost of the stock in inventory is somewhere between $5,000 and $7,000.

By instructions to their own sales people, and in practice, Texaco notifies Goodrich and/or Firestone that here is a new station that is opening up, here is the dealer's name and—or prospective dealer's name—and before that man gets anywhere near his station—we have an instance of the man having been contacted three weeks before he got his station—the rubber [9523] companies are in to see the prospective lessee, they have an opportunity to push their product, and as a matter of fact the Texaco people introduce the prospective lessees on many occasions to the rubber company employees.

Commissioner Jones: Are there findings on this? As I understand respondents' argument here, they claim this is factually not true and not present in this case.

Mr. Dias: That is why I mention the fact that apparently memories have dimmed over the years.

Commissioner Jones: In other words, your briefs will document this.

Mr. Dias: Yes, ma'am. They certainly will.

They then talk about training schools.

In the Texaco-Goodrich case, there is not too much along the line of training schools as such. However, it is clear on the record that when they do put in a lessee, a prospective lessee, through any sort of training, it is in a station where there is nothing but sponsored products promoted. In addition to that, they coach the dealer to the extent of showing him pictures at home. Their entire thrust is in connection with the promoting of the sale that is the business of convincing the lessee that there is only Goodrich or Firestone. Everything is emphasized—I mean every thrust is emphasized on the sponsored product.

The Texaco instruction, incidentally, on the opening of [9524] a new station is as follows:

"It is important that the tire company salesmen be notified in advance of our intention to nominate a new account, and that he be requested to contact the account."

The benefit of this—Goodrich's own vice president agreed that it is a great help to be given the operator's name. A Firestone representative stated that this is the best time to get close to those guys, because if you can get them before competition does, you get them buttoned up.

On the double teaming that respondents claim is not in this regard—it amazes me, because one of their own witnesses testified that a Firestone man—testified that Texaco salesmen accompanied him 15 to 20 percent of the time. There is evidence in there that on call the Texaco salesman will accompany the rubber people. This again is something I can and will brief thoroughly for you. I think there is ample evidence in this record of the double teaming.

As a matter of fact, as I mentioned before, even before they move into their station there is a form of double teaming in that the Texaco salesman brings the rubber salesman, the sponsored rubber salesman, around to meet the new dealer.

Now, that is a form of double teaming.

The competing supplier, on the other hand, who did not have that benefit and called on stations commented that "When the

Texaco salesman is there in company with the rubber salesmen, [9525] if that is not pressure, I don't know what it is."

Commissioner Jones: Counsel, how do you answer respondents' argument that be that as it may, all these facts assume they exist, nevertheless it was not very successful. Where is the evidence of economic pressure when they only succeeded with 30 per cent of the dealers?

Mr. Dias: Well, perhaps I can answer that better this way.

You recall in the Atlantic-Goodyear case the Supreme Court, I believe it was, found that over a five-year period there were $55 million worth of sales under this sales commission plan—that was a six-year period—and over a five-year period in the Texaco-Goodrich case there had been something like close to a quarter of a million dollars' worth of sales. As a matter of fact, the combined commissions that Texaco received over that period of time was just about or almost 50 percent of the actual sales of TBA in the Atlantic-Goodyear case. And that, I think, is significant.

Now, as to these 30 per cent—if you are talking about the percentage of dealers that are buying the product, frankly, I do not recall this 30 per cent figure. I would not contest it, because we will brief it, and there has always been a real contest between us as to how you compute percentages.

But there is one point that should be borne in mind.

Texaco has about 38,000 stations—roughly that [9526] figure. That includes this 8,000 that Mr. Barton told you that are normally not considered in this TBA arrangement because they in turn buy from distributors or consignees, so that would lower your figure to 30,000, 31,000. Then out of that figure you have to deduct your "D" stations which majority, if not most, are not suitable for TBA sales—restaurants, garages and one thing or another—they are just not the ideal TBA type of service station.

That is not to say that there are not some contract stations which are TBA potentially—they have it—and there are some of them.

But among the lessees—they, incidentally,—the contract stations make up somewhere around 16,000 or 17,000 of this remaining 18,000—28,000 figure.

Now, among the lessees—and I think this is an earmark of some of the problems in the case—there are some, we don't know how many—the figures were impossible to obtain, apparently—but among those roughly 13,000, there are lessees who

are not TBA potential and consequently are not recommended.

Also, lessees who are not recommended or not accepted by Goodrich—and this goes for Firestone—are those whose location are in conflict with other distributors in the area. That is to say—and respondents among the 59 dealers they brought in had dealers who probably announced that they were not carrying Goodrich or Firestone TBA. But ultimately there was—[9527] it was developed there was another Goodrich supply point, either a store or a franchise operator, one thing or another, within a block of this station, or it was a tiny town that certainly could not support more than two distributors of any particular product.

Now, that, too, is an unknown figure, but it is a fact of life—that Goodrich, in other words, and Firestone also do not accept each dealer that is recommended for those reasons—that they could conflict with already established distribution.

We do not know what that figure is. We have tried to get some breakdown, but those figures are hard to get.

Along that line—I am not implying that respondents refused to give the figures. The case was brought in 1956, and I think it is significant to note that the override commission plan started with Goodrich in 1940. The question was asked whether or not they had changed over from purchase and resale, and the record only shows that prior to 1940 Goodrich had been—I am sorry—Texaco had been experimenting with different forms of TBA supply, and in 1940 finally devised and entered into the agreement with Goodrich providing for the sale of commission contracts. And I think, if you will keep that in mind, you will understand why the evidence in the Atlantic-Goodyear case is so much stronger when it comes to the crude, overt type of coercion.

Goodyear-Atlantic commenced their operation in—I [9528] think they negotiated in the latter part of 1950, and I think that the man actually commenced in March of 1951.

There are cases, I think I have mentioned before, issued in January of 1956, but obviously our investigation started earlier.

If I recall, I think the record demonstrates that our investigation probably started in around 1952 or 1953.

So you can see that in the investigation, or when the investigation occurred, the rubber hose marks were still very, very apparent in the Goodyear-Atlantic market.

There was no difficulty finding the stations and the operators who had been horse-whipped and forced into line.

The situation, or the change-over from purchase resale to sales commission, that was apparent,—they could not get away from that. We were in there early enough to get the evidence of that.

To begin with, as far as this record shows, Texaco never was in the purchase resale, or at least as far as we know they were not. And so you have a brand-new fresh practice insofar as Atlantic-Goodyear was concerned that merely by the passage of time we could not hope to match in the Texaco-Goodrich situation.

But again, I do not think you need that. I think that is only a matter of degree.

One other thing—I may as well tell you now—[9529] that you are not going to find here. You are not going to find the division of territory in the Texaco-Goodrich arrangement that you had in Atlantic-Goodyear. In Atlantic-Goodyear it was almost laughable. They had Goodyear sponsored on one side of the street, Firestone on the other. Not quite that bad.

But you don't have that here.

In this case, you find Texaco is willing to accept a commission no matter where the sales are made, who is making them, or how many are selling to them.

The record does show that the three rubber companies are in. They are sponsored. And I think even that in itself is highly suspect.

Certainly if an operator has any sense at all, he, I suppose, would buy the popular brands of any products. In Texaco, if a lessee chooses Firestone or Goodrich or U.S. Royal—and we do not know where that is going to end—they are collecting a commission.

But at any rate, to get back to—

Commissioner Elman: Suppose Texaco were to announce that it would make this arrangement with any TBA producer?

Mr. Dial: You know, I think they would love to do it.

Commissioner Elman: And in consideration for these services which Texaco would render, both to its dealers and to the TBA suppliers, it would request 5 per cent or whatever it is commission. Now, under that arrangement, assuming it was taken [9530] advantage of by a number of TBA manufacturers, would any one TBA producer be favored necessarily?

Mr. Dias: Well, I suppose not. But the oddity in this case is that in trying to walk this tightrope that Texaco has in explaining what it actually does to earn its commission, it has stated that whatever it does, it does for any brand of TBA. So then—because TBA is so important to their service stations, that a dealer cannot survive unless he has TBA. And so on the one hand they would have you believe that everything they do, all the encouragement they give their dealers, and all the ideas they give them for sponsoring, stocking and selling TBA applies across the board to all sellers.

Now, if that is the case, it seems as though Firestone and Goodrich are a couple of philanthropists. They do not have to do that, apparently. But I do not believe that for a minute. I think the thing that is selling this TBA for Firestone and Goodrich is merely this hunting license, this 10 percent commission for going in there and talking to their dealers. That is all in the world that they are being paid for. Because—Mr. Barton has said that Texaco does most of the selling. At least he said that one minute. I think the next he said something else.

But the fact is and the record shows that Mr. Hoban, their vice president, general manager of merchandising said, "We, Goodrich, actually do the selling. We rely on Texaco for [9531] something else—they keep the people stirred up during the year" or some other such thing. "But we, Goodrich, actually do the selling." And then when you read the testimony of Mr. Grelecki, who was questioned along these lines, he is a Goodrich distributor, and you find he as a Goodrich distributor has all the headaches. He does all the work.

So it is hard to tell who is doing what for whom and who gets the 10 percent.

Commissioner Elman: What happens to the idea of a captive market if you have nonexclusive sales commission agreements with a large number of TBA suppliers? The dealers of a particular oil refinery do not become captive, do they, in that situation?

Mr. Dias: They are captive to the extent that the boss is telling them—"This is what we think you should carry," and under the circumstances I do not think they have too much choice. Sure you are going to find some dealers who are pretty bull-headed about things and they refuse to go along. It is just bound to happen in an organization that big. But I think

they play the percentages, and they know that the average lessee is going to be willing to live the easy life, and go along with the recommendation.

Commissioner Reilly: What if Texaco took a survey and they found that their stations, on an average, preferred these seven brands of TBA, and they entered into consignment agreements with these seven groups?

[9532] Mr. Dias: Consignment or commission agreements?

Commissioner Reilly: Commission—excuse me. Would that be wrong?

Mr. Dias: Well, of course, you are posing something that has not happened, and I can only judge by what happened in Atlantic-Goodyear.

I think if there was an eighth company that would promise to give Texaco a little bit more, I think they would wind up with the eighth company. As in Atlantic, 60, 70 percent of the dealers wanted to stay put.

Commissioner Reilly: Let's say they had eight companies, and they were using their economic power over their dealers to force the dealers to take one of those eight companies. The dealers had a choice of eight. Is that all right, or is that wrong?

Mr. Dias: Well, I don't know. I don't think I can answer that. Certainly the bind is less if they have eight, because if you talk about eight different rubber companies, for example, you are touching on just about everything that is in the business of any account. I don't know what the situation would be there.

Commissioner Jones: How many did they have in this case?

Mr. Dias: They have three. We started off with Goodrich and Firestone. We know about those two. And then later [9533] they started an arrangement with U.S. Royal.

Commissioner Jones: Anything in the record on the comparative prices to the dealers of sponsored and nonsponsored TBA?

Mr. Dias: Very little—very little. I can think only of a situation in Chicago—the witness from the Perry Tire Company indicated—of course this is hard to gauge. They were selling Goodrich and I think Firestone take-offs, and the take-offs—somebody buys a new car, rolls it into the garage, and takes off the blackwall and puts on white walls, and the tires are practically new. I don't think that would quite fit in. I don't know of anything offhand. If there is, I will certainly look. But I do not recall anything as to prices in this case.

Commissioner Elman: What was the number of TBA suppliers in the Atlantic-Goodyear case?

Mr. Dias: Designated supply points?

Commissioner Elman: No. Did Atlantic make the same sales commission plan arrangement with other TBA companies besides Goodyear?

Mr. Dias: Yes—Firestone.

Commissioner Elman: Just Firestone?

Mr. Dias: Yes.

Commissioner Elman: There are two in that case and three here.

[9534] Mr. Dias: Well, two in each as they started off, but ultimately three here.

Commissioner Reilly: In the Atlantic case, were not the Firestone and Goodyear territories divided?

Mr. Dias: They divided territories in that case.

Commissioner Reilly: So in effect in a given area there was only one?

Mr. Dias: That is correct, that is correct. So that you had an entirely different situation there in that respect. But again, as I say, that is a matter of degree, because in a situation of that sort you have added to your nonsponsored sellers of TBA products—you also have one who nominally is a sponsored product, but not sponsored in that particular area. And that is a situation in that case.

Commissioner Elman: Well, do you think that we could make—we could properly make in this case the same conclusion that was made in the Atlantic-Goodyear case, where the Supreme Court said that the Commission was well justified in concluding that Goodyear had in effect purchased a captive market?

Mr. Dias: I do not——

Commissioner Elman: Now, has Goodrich in effect purchased a captive market if there are other lines of TBA that are sponsored by Texaco?

Mr. Dias: Well, two things to bear in mind.

First, Goodrich was the first in this with Texaco, [9535] as far as I know. So from 1940 to about 1943 it was Goodrich alone.

In 1943 they entered into a contract with Firestone—Texaco entered into the contract with Firestone. So you have—to the extent that Goodrich has bought the control and economic power of Texaco in order to get these stations, I would say yes, it does fit into the same thing. I do not think the fact that there

are two changes the situation to any—in any material respect.

Commissioner Reilly: Well, Mr. Barton is going to give us figures on the amount of sponsored TBA products sold to Texaco stations by Goodrich—the amount of the whole sponsored TBA products sold by Goodrich. I wonder if you could do the same thing.

Mr. Dias: I intend to. I have done it before. The figures are here. As I say, there has always been some question as to who have come up with the proper figures. But we will have them in there.

Commissioner Reilly: Before we go any further, while we are talking about what you are going to do in your brief, I notice that Justice Goldberg, in his dissent, made a statement regarding the Texaco-B. F. Goodrich case—that is on page 3 of his dissent, I believe—saying that the Commission "expressly held illegal the TBA sales commission arrangement between Texaco and Goodrich without analysis of the relationship between Texaco [9536] and its dealers." I would like to have you cover that—if it is so or not so.

Mr. Dias: Well, I don't think that is so at all. I think the heart of the relationship is in the lease arrangement, and together with the sales agreement.

Now the leases, as I mentioned before, are for one year and—let me just step back one minute.

Texaco does not own all the properties that it leases to its operators. It leases many of those—many of those stations are leased—many of the properties are leased by Texaco from third parties and then in turn re-leased to operators in some instances may be those who actually own the property to begin with.

But in analyzing the leases in this case, bear in mind now that here is Texaco, a lessee of property from third parties, which they intend to dispose of some other way. You read those leases and you will find that every provision in that lease favors Texaco as a lessee.

Now, the normal practice certainly is, or the normal occurrence is that the lessor of property is the dominant party. Certainly anything, any odds that favor anyone in a situation of that sort run towards the lessor. But that is not true in connection with property that Texaco leases from third parties.

Now, when Texaco in turn re-leases that property and property that they own outright, you will find that lo and behold,

[9537] once again the lease—all the terms of the lease run in Texaco's favor.

Now, we pointed that out at some stage of this proceeding and the reply was sort of funny. Texaco said—that is not unnatural, "but those are our lease forms." So if the party just gets in there and prints their own lease forms, I take it they can be the dominant party in any transaction.

Well, I think—I do not think that is true.

But at any rate, in addition to having everything run in their own favor, you will find that although the lease is run for a year, and subject to termination on thirty day notice either at the end of the year or whatever the period is—you will find that there are other provisions in there that definitely give Texaco at its option, strictly by its own arbitrary determination, the right to cancel out if they see fit.

Now, there are many reasons—and I can get to them right now.

Commissioner Reilly: If you are worried about answering my question, I just suggest that you answer that, and answer that question of the Supreme Court dissent in your brief.

Mr. Dias: I had that in mind, yes sir; and I can belabor that for half the time that is remaining to me because I think the leases—in fact, it is not original with me, certainly. The courts have said it.

These leases and sales agreements—the petroleum sales agreements are the heart of the case. They are the source [9538] of the leverage.

The sales agreement runs concurrently. And this sales agreement deals with the sale of petroleum products. They run concurrently.

Commissioner Elman: You sound as if you agree with Mr. Justice Steward, who also said the relationship between the refiner and the dealers was at the heart of the case, and that it did not make any difference what particular plan was used, so long as that relationship existed—any plan of TBA which the refiner sponsored was going to have an unfair competitive advantage over every other.

Mr. Dias: You know, if I may state my own personal views—I know that the phrase, "per se" is almost nasty. But in my own opinion, I think under the sales commission plan I believe that it is per se illegal for an oil company to deal in TBA, and for many reasons.

Commissioner Reilly: If that per se illegality is based upon the relationship between the dealer and his refiner, then doesn't that also hold true for the purchase resale plan?

Mr. Dias: It would appear so on the surface. But let us just point this out.

Commissioner Elman: You are not saying that the sales commission or anything else is illegal per se. What you are saying is the relationship between the gasoline refiner and his dealers is illegal per se. That is what you are really [9539] saying.

Mr. Dias: Well, I don't know if I want to go that far.

Commissioner Elman: Because you are saying the essence of this thing is in that relationship, and not in the particular form of the distribution plan. What difference does it make whether it is sales commission plan or a purchase resale or anything else, so long as you have that inequality of bargaining power you are going to have a captive market. If you have a captive market what difference does it make how you sell that captive market?

Commissioner Reilly: You would not object to a purchase resale plan where the gasoline refiner purchased tires from eight to ten tire—battery accessory manufacturers—even though they had economic power over their station.

Mr. Dias: Well, if I may again—and this is my own personal thought—if we had the authority, if we could write the order——

Commissioner Elman: You won't have that opportunity, believe me. You can make suggestions, but you won't be writing any order.

Mr. Dias. It would be my thought that the oil company should be out of TBA entirely.

Commissioner Reilly: How about the problem that Justice Goldberg is worried about? Should they be out of it entirely or only out of it in regard to large refining or [9540] integrated station operations? How about—in this case——

Mr. Dias: The amicus that Mr. Justice Goldberg—

Commissioner Reilly: Pertaining particularly to this case. As I recall, there are three companies—Jenney and Shell American——

Mr. Dias: There are a total of five other oil companies besides Texaco.

Commissioner Reilly: But there are some fairly small ones.

Mr. Dias: I believe that is true.

Commissioner Reilly: Justice Goldberg seemed worried as to whether the order should cover the Goodyear—well, the tire,

battery and accessories manufacturers relationship with the small companies as well as the larger.

Mr. Dias: In my opinion it should. I do not see any reason for an oil company, small or large, to be in the TBA business under the sales commission methods of selling TBA for only one reason.

Commissioner Reilly: What if Jenny Petroleum, if I am saying it correctly, had no relationships with their stations—if they had stations—such as Texaco has?

Mr. Dias: Well, that is along the lines of the comment that the majority made in the Supreme Court. I recognize that. But truthfully I do not know what marketing oil company does not have this type of arrangement with its dealers.

[9541] Commissioner Reilly: We just heard three weeks of that.

Mr. Dias: Sir?

Commissioner Reilly: We have the advantage of having heard three weeks of that.

Commissioner Elman: We know that some oil companies do sell some retailers without any kind of string attached—they just sell them. There are jobbers and there are other forms of distributors, other kinds of distributors.

Now, suppose you have an oil company like that,—just somebody who sells gasoline to an independent businessman who is a retail seller of gasoline. Now, is Goodrich to be barred from entering into a sales commission arrangement like that?

Mr. Dias: Since I was ignorant of any other method of selling this—the Supreme Court has said this order in Atlantic-Goodyear, as they see it, does not preclude Goodyear from entering into an arrangement with an oil company that does not have the same type of leverage over its operators, or whatever type of type they sell to.

Commissioner Reilly: And they said that they would have to come back in and ask us to change the order. But now we have the advantage that if we are going to write an order—to leave that out now. Do you have any recommendations on that?

Mr. Dias: Do I have any recommendation?

Commissioner Reilly: Yes.

[9542] Mr. Dias: I would say leave it in. I think that—

Commissioner Elman: When in doubt, leave it in.

Mr. Dias: You know, I would like—I have been tangling with Goodrich and Texaco so long I feel I have an affinity in their

interest. And I know that over the years—I have seen some of their reports—they do very well. I just feel like I would like to share in these profits myself. I would like to declare myself in.

But you know something—there is no guarantee under our system of free enterprise, there is no guarantee that anybody can get into a market, a particular market, or if he gets in that he is going to make a success.

Certainly the most favorable business to be in—I mean the best chance you have of making money is at the oil company level in the TBA business, because you do nothing and you get all this money. It's wonderful.

Commissioner Jones: Well, counsel, isn't the vice of this arrangement, as the Supreme Court put it, was some element of coercion, regardless of how you define that. Now, as I read the Supreme Court decision in Atlantic they found those elements of coercion not only in direct activity, but also in the economic relationship of the major and the service station.

Now, if you have no economic relationship, such as would give the supplier this kind of economic leverage, inequality, [9543] bargaining power, and you have no coercive act, then I assume such a sales commission plan would not be illegal. But if your find either one of those two elements, either coercion as a result of an economic disparity relationship or coercive activity, you would then find an illegality.

Mr. Dias: I think that is true. But again my own philosophy is this.

If a man wants to get into the TBA business, let him get in the business. I don't understand what he has to offer if he is not in the business.

Commissioner Jones: I am not sure that is relevant, counsel, to whether these products have been imposed on unwilling purchasers, which I think is the vice of this arrangement. I think this is what the Court is saying when it says it is not per se illegal. It says it is illegal if it in fact coerces people to do something that they otherwise would not want to do, and therefore it keeps out nonsponsored TBA manufacturers.

Now, if it is not keeping them out, it is not illegal.

Mr. Dias: Well, insofar as this record is concerned, I think you will find the competitive effects of this.

—We had 20—I think maybe about 40 representatives of 20 supply points of competing TBA products. It is just almost unanimous. They all testified that they would go into a Texaco

station, try to sell them, and invariably they made no sales. Certainly they could not make initial purchases.

Commissioner Jones: They were at a competitive dis- [9544] advantage because there was some element on the dealer that made him feel he ought to prefer the sponsored TBA.

Mr. Dias: Exactly so.

Commissioner Jones: But if the dealer does not feel that, then there would not be any competitive effect.

Mr. Dias: That is possible. I am so ingrained in this one, where there was all that, that I do not really know what answer to give you as to the other situation. As I say up until this minute I did not know there were other arrangements.

Commissioner Jones: I wanted to bring you back to this record, because it seemed to me you were going into a generality, where you personally regarded these arrangements. And I do not think that is the material point of what the Supreme Court is saying, what is in this record. But I take it your argument is there is some element of coercion—whether it springs out of the relationship or out of direct activity.

Mr. Dias: Exactly. This record is rampant with it. And we will have no difficulty in pointing it out. It obviously is going to be a lot easier in the briefs to get each of these points, and we will certainly take care of that.

Now, another component of the sales commission system were these credit card arrangements. If you recall, there was a period when Texaco did not restrict the use of its credit cards only to the sponsored TBA products. I think that came about [9545] because of war-time restrictions, one thing and another. But at any rate, there is a period when they did not restrict it to sponsored TBA. But before and after that period, and up to date, as far as I know, the purchases of sponsored TBA alone are approved by credit cards. In other words, theoretically they cannot—a dealer cannot sell nonsponsored products via credit card.

Now, respondents submit point to the fact that some of their dealer witnesses said—yes, they will charge it, a nonsponsored product. But I think when you read the evidence you will find that they did it with a great deal of trepidation.

One dealer for example said, "When I sell a nonsponsored product and I put it on a credit card, I either do not label it,"—one said, "I don't designate what it is," or another one said, "I call it a Firestone or a Goodrich tire, because I know what it says on the back."

Now, in the credit card itself, there were facts developed in that area that demonstrated again this overbearing control that Texaco has on its dealers.

One of their own witnesses, a man by the name of Bailey, down in Norfolk, was obliged to make good on a couple of credit sales—incidentally, he carried nonsponsored TBA products in his station. He was obliged to make good on a couple of credit sales that had bounced. The harsh part of it was that the company said that the credit cards had expired, or they [9546] had withdrawn them but they never notified Mr. Bailey and as far as he knew—he had been selling these people earlier by a credit card—and it had been all right. In other words, Texaco cancelled its credit card and did not notify the dealer and when the credit bounced they nevertheless made Bailey pay for the amount owed.

There was another situation of that out in Omaha, as I recall. And so again, it just demonstrates this tremendous power that Texaco has and exercises.

Commissioner Jones: You are arguing that the dealer might have been free to buy nonsponsored TBA, but he would have to pay some kind of a price for it—to wit, he could not use the credit cards and some of the other facilities.

Mr. Dias: I think—and I think the evidence is pretty clear—that the dealers, generally speaking, were aware of the limitations on the credit card and I think that perhaps there were some—there was some bootlegging of nonsponsored on occasion. But certainly they covered it if they could.

Commissioner Jones: The policy was that you could not charge nonsponsored.

Mr. Dias: That is right. And the dealers were so notified in no uncertain terms. They even went to the trouble of explaining to them that in the event they charge something that is not authorized it would never stand up in court—[9547] "We cannot enforce the payment of the credit." And I think that that is—that served the purpose of causing most dealers to sell only sponsored products by credit card.

I think there was some mention made of policy letters. I will touch on that just lightly, because time is running short. Texaco, coincidentally, after each of several significant court actions put out so-called policy letters. But they were all addressed to general management people, and it was passed down the line to the salesmen, but it stopped there. Never once did they show those letters to a dealer. They never showed them

to the dealers. And if that was policy—in other words, I don't know what it had to be repeated significantly after various court actions—significant court actions.

Number two, I don't know why, and the record does not show why they were not shown to dealers.

Commissioner Reilly: Did you present any evidence as to the relative positions in a gas station or in a dealer's station—the relative positions of sponsored and nonsponsored TBA products?

Mr. Dias: We had testimony along this line—and this may not be completely in answer to your question—for example, one of Texaco's own salesmen in Chicago said that out of 89 dealers in his area, 89 Texaco dealers in his area, he only knew of one that did not carry Goodrich or Firestone. Now, that does not go to the quantity of the various products in the [9548] station.

Commissioner Reilly: That is interesting information. But the thing that I was interested in was this. For instance, is the Goodrich and Firestone tire out in front, and the other tire or battery or accessory in the back room?

Mr. Dias: Well, we have one instance in Chicago that I can recall offhand. Again, this was one of respondent's witnesses, a Mr. Grelecki, who was a Goodrich distributor. He testified that—and his figures, too, are significant—he estimated that, I believe, 75 per cent of the dealers in his area carried—Texaco dealers carried either Goodrich or Firestone, and in the stations to whom he sold Goodrich products, some of them also bought Firestone but kept those in the back room. That's the testimony of one of respondents' witnesses.

Mr. Barton referred to the testimony of 59 dealers that were used in the defense by Goodrich, and he has urged you to read their testimony. I can do nothing more than urge you to read their testimony myself. These 59 dealers came from various scattered locations throughout the country. We joked about it many a time—I could see them arm in arm going from the West Coast to the East Coast looking for these dealers, and they came up with 59. I think you will find when you analyze the evidence that what they produced was not much. They would have dealers from small towns, where there were either no other Texaco stations or they had dealers who were in small towns where there were other [9549] distribution points near them.

In addition, from the mouths of their own dealers we developed evidence of the coercive power, again, of Texaco.

Down in hot Dallas in the summertime they were called up, they wanted to interview these people, and they called the dealers up and said, "We would like to interview you—come down to the office," so they went down.

Now, as to that particular comment on the dealers—I prefer to rely on the Seventh Circuit, where they claimed that the dealer testimony introduced in the Atlantic case, where 13 dealers were introduced—Atlantic claimed that that was not sufficient. In the Seventh Circuit, they said, "We disagree."

Commissioner Elman: What page is that?

Mr. Dias: That is at 401. That is 331 Fed. 2d at 401. The Seventh Circuit said, "We disagree. The evidence relating to overt coercion tactics, although not extensive, must be considered with the testimony of the witnesses representing competing suppliers to the effect that the dealers felt that if they did not carry sponsored TBA they risked reprisals. Also to be considered are the policing tactics of Atlantic salesmen and the surveillance of the so-called phantom customer inspectors".

Now, and let me continue,—"Moreover, it should be noted that the Examiner in considering the testimony of the dealers who testified for Atlantic recognized that these witnesses were under considerable pressure because they were naturally [9550] interested in not jeopardizing the renewal of their leases."

The Examiner made the same finding in this case. The phantom customer inspector is one element missing—the only element missing. We did not have anybody in Texaco—they did not employ a "phantom customer inspector." But they did inspect. And they did keep them under surveillance.

As a matter of fact, Texaco said it was not unusual for salesmen to go out and look around the station and see whether or not they were carrying sponsored TBA.

Now, that is a sort of a form of a white list. They did not go in to see if they were carrying nonsponsored. They went in to see if they were carrying sponsored. It amounts to the same thing.

Commissioner Reilly: There is nothing in this case like the Atlantic case of a list of noncompliers?

Mr. Dias: I don't quite go along with that. In Norfolk, where incidentally the incidence of adherence to the program was very high—I think 90 per cent of the dealers down there carried spon-

sored TBA—at one point there was—and there is in the record—a notice to the home office by the local man to the effect that there are, I think it was, 48 dealers not carrying sponsored TBA, and I think they also noted that there were something like 51 who did not carry TBA at all. But the list of those not carrying sponsored TBA was sent to the home office.

[9551] When respondents put in their defense, they brought in about five of those dealers. One is this Mr. Bailey. And the names of the other four escape me.

But the sum and substance of the testimony of those other dealers, some of them, most of them, was that they were in small, isolated areas, or they were the only dealer in town, or that Goodrich or Firestone supply points were near them.

As I say, it is unfortunate we were not able to develop the full number of Texaco dealers who were in fact nominated to and accepted by the rubber companies. Those figures were not available. But as I pointed out, pursuant to the sales commission agreement, the rubber companies do not approve stations which conflict with existing distribution.

Along that same line, when we put in our case we in fact did use only about 8 or 9 ex-dealers. But as I mentioned before, we used something like 20 independent distributors, or distributors of independent—nonsponsored TBA, and used just about all the sales force, so we had a total of 40 some odd witnesses representing some 20 distributors.

During the cross-examination of each of these witnesses respondents made a great point of developing the fact that there were other sellers of nonsponsored TBA in the area. And yet would you believe it—when they put in their defense, they did not produce one single distributor, successful or otherwise. The only successful distributor that they put on were two who [9552] happened to be distributors of sponsored TBA. They were very successful.

On the question of—Miss Jones, you asked about commissions on the sale of TBA. It is a fact in this case, unlike the Atlantic-Goodyear case, the salesmen, Texaco salesmen, do not receive a commission on sales of TBA into the Atlantic service station market. But their performance of their duty is based on their sales, and increasing sales, not only of gasoline products but of TBA products sponsored TBA products. In other words, it is part of the criteria for determining whether or not they are doing their job or not doing their job. So indirectly——I——

Commissioner Jones: What is the evidence of record on that?

Mr. Dias: As to——

Commissioner Jones: Is there some standard of internal Texaco policy statement that tells their servicemen this is true?

Mr. Dias: Oh, yes, we have a record citation for that.

Commissioner Jones: Is it testimony or what?

Mr. Dias: I am trying to remember now. It may come out of a manual or it may be out by testimony. Let me see. Maybe I can find that.

No, I'm sorry, I do not have a note on that. But it will be documented in our brief.

[9553] Goodrich believes that it should not be included in this order. I think that this record is very clear that whether or not Goodrich goes out with a whip in its hand and helps Texaco salesmen or other personnel to push TBA products, that they nevertheless are well aware of what it is they are buying. And I think the best example of that is the fact that the sales commission itself is limited to outlets which handle Texaco gasoline exclusively, or a hundred per cent. Goodrich and the Firestone agreements are somewhat similar—there is just that variance. One talks in terms of a hundred per cent the other says exclusively.

Commissioner Jones: There aren't split stations in the industry?

Mr. Dias: Very few. I think you would find some in rural areas. But as long as the standard station—during the Standard Station case, the Court there found it was down 1 per cent, 2 per cent.

Commissioner Jones: Then what is the significance to you of the fact that the contract says this relates to Texaco stations that use exclusively Texaco gas?

Mr. Dias: Because if Texaco was the super salesman that Goodrich would have us believe it is, there would be no reason why Texaco could not sell their product to a Conoco station or a Shell station. If their salesmen are that adept at selling Goodrich TBA products, why not pay the salesman [9554] the commission or Texaco the commission for this great salesmanship, no matter where they sell it. But it must be to a service station that is a hundred per cent selling Texaco gasoline exclusively.

Also excluded are stations which Goodrich owns or has a controlling interest in. And it seems back from the very original contract in 1940, where they talk in terms of percentage—if

Texaco owned 51 per cent of the station, then they would pay them a commission.

In other words, there was always that superior or economic background which is an important element in the sales commission arrangement.

The same is true in their dealings with Conoco. The same situation exists. And they also have a written contract with Ohio Oil—the situation is identical, I believe, in that, as well as Conoco. And then three others in which they have oil arrangements.

Commissioner Jones: What is the evidence in the record as to the relationship with Conoco and its service stations?

Mr. Dias: Well, we have the leases. We have—they contain the same type of housekeeping provision, short-term loan of equipment.

Commissioner Jones: Credit cards?

Mr. Dias: Credit cards. We have the testimony of one ex-dealer who testified as to the extreme pressure put upon [9555] him to buy Goodrich when Conoco decided to enter into a sales commission arrangement. Yet the testimony of various competing suppliers—suppliers of competing TBA products who testified that they had extreme difficulty, similar, almost identical to the Texaco situation, in getting into the Conoco stations.

Commissioner Jones: Do you have that kind of testimony for Texaco, too, competing TBA dealers?

Mr. Dias: Yes, we have these 20—20 competing suppliers of competing TBA products, as represented by some 40 of their salesmen.

Commissioner Jones: What other oil companies were in this?

Mr. Dias: There was Jenney, up in the New England State, Shell American Petroleum, and Emblem Oil Company.

Commissioner Jones: What do you have in the record on Jenney and Emblem?

Mr. Dias: Very little. We have statistics—in other words, the amount of sales—I think that is about all.

Commissioner Jones: What is the basis on which you are asking the Commission to declare those agreements illegal?

Mr. Dias: I think on the same theory that the Supreme Court has sustained the Atlantic-Goodyear arrangement.

We have here, in my opinion, sufficient evidence as to the operation of the plan as to Conoco. We have overwhelming evidence in connection with the Texaco arrangement. And I

think [9556] that we have as much as to the remaining oil companies as they had in the Atlantic-Goodyear case.

Commissioner Jones: You will analyze all of those I assume in your brief as well.

Mr. Dias: Yes, ma'am, I can do that on about one page. There is very little. But again in connection with this one oil company, I believe it was Shell American, again it is interesting to note the Goodrich intent to buy control. We have some correspondence in that case which talks in terms of X station will have to deal with us because he owes so-and-so $8,000, and he will recommend our product.

Commissioner Jones: Jenney, Shell American?

Mr. Dias: That was Shell American.

Commissioner Jones: What do you read in the Supreme Court opinion that will enable us to declare the contracts with Shell American and Jenney, for example, as covered by the Atlantic case?

Mr. Dias: I would say so, yes.

Commissioner Jones: What element, what in the opinion?

Mr. Dias: Well, I think the fact that this Commission has found an illegal arrangement in connection with the Texaco situation. I think you can find the same thing on the evidence we have as to Conoco. And I believe under that situation I do not think we have to probe or try each and every such [9557] arrangement.

Commissioner Reilly: The Supreme Court seems to put the burden on the TBA company to show that they have—the other arrangements are different.

Mr. Dias: That it is different than those that have been declared illegal. I believe that is true.

Commissioner Jones: What evidence do they put in to show that—anything?

Mr. Dias: Who, in this case, you mean?

Commissioner Jones: Yes.

Mr. Dias: No, I think that was a matter of conjecture—

Commissioner Reilly: Do you think the Supreme Court is putting the burden on the TBA company to change the order of putting the burden on the TBA company in the trial of the case?

Mr. Dias: I think more than likely in the trial of the case. Unless you have further questions, I think I have covered the matter.

Commissioner Elman: Thank you very much.

Mr. Handler: May it please Your Honors, I found Commissioner Elman's analogy between a captive market and a captive audience very illuminating.

You three Commissioners are required by law to listen [9558] to our argument. You are a captive audience. Those in the room behind me are and were free to leave at any time. They are not a captive audience. The distinction is the key factor requirement. There is a captive market when there is a requirement on the part of the dealer to buy.

Commissioner Jones: How about an inducement?

Mr. Handler: There is no captive market when the dealer is free, as this record establishes, to buy or refrain from buying. Inducement——

Commissioner Jones: Take the credit card thing which troubles me.

Mr. Handler: The credit card thing was incorrectly stated.

Commissioner Jones: Aren't you paying the penalty by not carrying sponsored? Isn't that——

Mr. Handler: No—and the facts are quite different. A Texaco credit card can be used for nonsponsored TBA purchased on the regular basis of regular payment. A Texaco credit card cannot be used for nonsponsored TBA which is bought on the instalment basis, with payment deferred over a long period of time. There is a good economic reason for this. There is no penalty.

Now, inducement is sheltered by the First Amendment. A large company has free speech rights as well as a small company. You are allowed to induce if that inducement is untainted, is free from coercion, however defined.

[9559] Now, a court or a tribunal always has the choice of deciding the matter on the broadest or the narrowest possible ground, or to seek an intermediate position.

Now, if the Supreme Court of the United States had wanted to hold that sales commission is unlawful where there are terminable leases between an oil company and its dealers, it would not have been a difficult matter for it to have said it. It did not say so.

If the United States Supreme Court wanted to hold that sales commission is unlawful, where there exists the type of relationship that obtains between an oil company and its dealers,

it could have said so. The Supreme Court is master of the English language.

It did not rest its decision on any of these broad grounds. I read to Your Honors from page 70 of the Opinion where Justice Clark says the short of it, and he then summarizes the basis upon which he rests his decision.

Commissioner Elman: Included in the short of it was I think—I may be wrong—the notion that there was, I think, well expressed by the Seventh Circuit, in that case, that the dealer who buys from a major refiner is not a real independent businessman—he is an economic serf. And when you start talking about inducements to someone who is relationship to you is that of an economic serf, it is not quite the same as [9560] inducement as between equals.

Mr. Handler: I have to disagree with Your Honor with respect to both aspects of your observation.

First, if you will turn to page 13 the Court is not using the language of the Seventh Circuit, it is using the language of the Court of Appeals of the District of Columbia.

Secondly, Your Honors are not going to assume that a dealer is a serf. That has to be proved. And there is no proof to that effect. That is the key of this case.

There is no proof in this record that will support a finding that a dealer, a Texaco dealer, is a serf.

Commissioner Elman: Don't you have the same evidence of the relationship between dealer and refiner in this case as you had in the Atlantic case in which the Seventh Circuit—in which I think the Supreme Court must have had in mind by its citation of the Simpson case—where Mr. Justice Douglas used the same kind of language. It may be rhetorical to refer to a dealer as a serf, but isn't that the right word?

Mr. Handler: The Simpson case referred to the short-term leases as probative of power. There was one element. There was specific evidence in that case of coercion. Indeed, Simpson himself was cancelled because he would not abide by the oil company's retail pricings.

Short-term leases were deemed by the Supreme Court as one piece of evidence tending to explain what gave Atlantic its [9561] power vis-a-vis its dealers. But such leases are not probative of improper exercise of the power. It is one of many facts.

The Supreme Court did not say that this fact in and of itself was conclusive. It would have been a very simple thing to have said that. It did not hold that you cannot have sales commission where you have terminable leases. It analogized—it said the Commission analogized the situation to a tie-in.

Take the man who owns a patent. His customers do not even have a short-term lease. He has power. If he has a valuable patent—take color television. You have the power to impose full line forcing or tie-in. But there is no violation of law unless you actually impose the condition that you buy the second product in order to obtain the first.

There is great disparity of economic power—there isn't even a lease. A man could build his entire business on the purchase of a patented product and tomorrow find he cannot buy that patented product. There is no compulsion to sell the patented product. It is not the mere existence of power. It is the exercise of the power which was the core of the decision before the Supreme Court.

Now, I say with all the respect of which I am capable, however you define coercion, whether you define it as covert or overt, express or implied, whether you imply it from a course of dealing, whether you imply it from relationships, you still must find coercion. It is a legal concept. [9562] You must find that the buyers were compelled to purchase against their will. There has to be a rational inference from undisputed facts. And I respectfully submit that under no circumstances in this case can you find the coercion.

The fact that Atlantic may have misacted does not mean that every oil company improperly carries on its affairs.

Guilt under our system is personal. You have got to prove that we did something wrongful. And the fact that we are a big company, the fact that we have terminable leases, that is not enough.

Now, obviously, there is not the time available for me to take issue with my good friend Mr. Dias.

Your Honors have the very difficult task—here is the size of the record, five printed volumes. It is your responsibility to make findings of fact which are supported by the record.

I am not going to ask you to take my word for it. We shall brief and document all these points. We will establish that the credit card situation was not as stated by Mr. Dias, the double

teaming situation was not as stated by Mr. Dias, and many of the statements that he made with respect to our conduct, our power, our acts, are unsupported by this record, and we will cover that in our brief.

I want to end with this one very elementary remark. I said that guilt is personal. It is very illuminating [9563] to me that my good friend constantly refers to the Seventh Circuit opinion for facts. Those are facts in a different case. The proof of the pudding is in the eating. If we had this power, if we abused this power, if we compelled, if we coerced, if this relationship in and of itself had the effect indicated, if the terminable leases would be a conclusive fact, why is it that this record will establish that Goodrich, which is bound by the order that has been issued so far, sold not more than 10 per cent of the Texaco outlets? What kind of power is that? What kind of farming out of power is it? What kind of aiding and abetting is it to compel people to buy contrary to their wills?

I tell Your Honors that you will not find in this record support for the view that the Texaco dealer is anything other than what he himself testifies to be, and that [if] he is an independent dealer who buys in accordance with his own dictates, and not the dictates of any master. He is not a serf.

Commissioner Elman: Mr. Handler, if the Commission should conclude that there is a violation on this record and the findings of fact made on this record support the same conclusions of law as were reached in the Atlantic-Goodyear case, would you and Mr. Barton brief to us the question of the appropriate order to be entered?

Mr. Handler: We will be delighted to do that, Your Honor.

[9564] Commissioner Elman: And if there are to be any changes from the order that was upheld by the Supreme Court in that case that you wish to urge, would you urge them and give supporting reasons in the record?

Mr. Handler: We would be pleased to do so. I am glad you are asking us, because I would not want you to imply from the fact that we deal with the order that we in any wise lack confidence, (a) in our interpretation of the Supreme Court opinion, and (b) our analysis of the facts.

Commissioner Elman: Well, my request does not imply we have reached any conclusion on the merits.

Mr. Dias: Will we have answering time on this?

Commissioner Elman: Well, the order provides when the briefs are due.

Mr. Dias: Will we be able to answer each other?

Commissioner Elman: You can make such request to the Commission as you need.

(Whereupon, at 4:25 o'clock p.m., the Oral Argument in the above-entitled matter was concluded.)

[9453] (January 14, 1966)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
PHILIP ELMAN
EVERETTE MACINTYRE
JOHN R. REILLY
MARY GARDINER JONES

[SAME TITLE]

By Commissioner Elman:

I

On April 15, 1963, the Commission held unlawful as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act[1] a sales commission agreement between The B. F. Goodrich Company ("Goodrich") and Texaco, Inc. ("Texaco"). Under that agreement Goodrich pays Texaco a commission for promoting the sale of Goodrich tires, [9454] batteries, and automotive accessories ("TBA") to its retail gasoline dealers. By its order, the Commission enjoined Goodrich and Texaco from carrying out their agreement and from performing or entering into sales commission arrangements with any other companies. On review, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order and directed the Commission to dismiss the complaint. *Texaco, Inc.* v. *F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964). On June 7, 1965, the Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and directed that the case be remanded to the Commission "for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n* [381 U.S. 357 (1965)]." *F.T.C.* v. *Texaco, Inc.*, 381 U.S. 739, 740.

[1] Section 5 provides in relevant part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

In *Atlantic*, the Supreme Court upheld (1) the Commission's decision that a sales commission agreement between Atlantic Refining Company and Goodyear Tire & Rubber Company was an unfair method of competition, and (2) the Commission's order prohibiting Atlantic and Goodyear from carrying out their agreement and from performing or entering into any other sales commission agreements. The Commission, without the participation of Chairman Dixon and Commissioner MacIntyre, has reviewed afresh the entire record in this proceeding, in the light of the Supreme Court's decision in *Atlantic*. We have concluded, for the reasons set forth below, that the sales commission agreement involved here is, in its fundamental operation and effect, indistinguishable from the one held unlawful in *Atlantic*, and that an order like the one affirmed by the Supreme Court in *Atlantic* should be entered here.

I.

An assessment of the relationship between this case and *Atlantic* requires a brief description of the events leading to this remand. This is one of three companion cases in which the Commission challenged, as an unfair method of competition, sales commission arrangements between major rubber companies and major oil companies. In *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, decided [9455] March 9, 1961, the Commission entered an order prohibiting Goodyear and Atlantic from employing sales commission plans. On the same day, in *Firestone Tire & Rubber Co.*, 58 F.T.C. 371, an identical order was entered against Firestone and Shell Oil Company. The Commission's order in *Goodyear* has been affirmed by the Supreme Court. *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357, affirming 331 F. 2d 394 (7th Cir. 1964). An appeal from the Commission's order in *Firestone* is pending in the Court of Appeals for the Fifth Circuit.

In both *Goodyear* and *Firestone* the Commission's reasoning was identical: It upheld the hearing examiner's finding that the oil companies used overt coercive tactics to force their dealers to buy the sponsored rubber companies' TBA products. But the Commission specifically declined to rest its decisions upon a finding of coercion or to limit its orders to injunctions against coercive tactics. Instead, it examined the unique degree to which the economic existence of gasoline dealers is dependent

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upon the good will of their major oil company suppliers, and concluded that the oil company "has sufficient economic power with respect to its * * * distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics * * *" (58 F.T.C. at 364-65, 407.) The Commission regarded "overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself" (58 F.T.C. at 348, 398). Analyzing the actual operation of the sales commission plan in the context of the economic relationship between the oil company and its dealers, the Commission concluded that the competitive effects of the sales commission plan were like those of an illegal tying arrangement—it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)". (58 F.T.C. at 367; see 58 F.T.C. at 406). Since the amount of commerce affected was "not insubstantial", the agreements were held unlawful.

However, in this proceeding involving the Goodrich-Texaco sales commission plan, the Commission did not reach the same result. On the same day that it issued its orders in *Goodyear* and *Firestone*, the Commission held that although [9456] "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics", the record did not contain "sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA". The case was remanded to the hearing examiner for the taking of additional evidence on that issue. *B. F. Goodrich Co.*, 58 F.T.C. 1176, 1178-79, 1183.

This disposition was, at the very least, enigmatic: In *Goodyear*, the Commission found that the competitive effect of the sales commission plan, like a tying arrangement, was the foreclosure of the substantial TBA marketing outlets represented by Atlantic's dealers. This finding was based upon competing wholesalers' testimony that they were unable to sell to Atlantic dealers who feared that Atlantic would look with disfavor upon their purchase of any but Atlantic-sponsored TBA products. Having made this finding, the Commission made no analysis of "market data" other than to observe that the amount of com-

merce affected was "not insubstantial" since Atlantic had sold about $50 million in sponsored TBA products during the period 1950-1956 (58 F.T.C. at 359-66). In *Goodrich* the Commission did not reject the hearing examiner's acceptance of the testimony of competing wholesalers regarding foreclosure of Texaco outlets, which was similar to, and as substantial as, that in *Goodyear*. The amount of commerce affected in *Goodrich* was considerably more substantial than that in *Goodyear*: in the five-year period 1952-1956 Texaco sold more than $245 million in sponsored TBA, almost five times as much as was involved in *Goodyear* during a six-year period. What additional "market data" was required is unclear.[3]

[9457] On remand, after taking further evidence, the hearing examiner found that the sales commission plans had been shown to be an unfair method of competition, and entered an order identical to those previously entered in *Goodyear* and *Firestone*. An appeal was again taken to the Commission. By that time, the composition of the Commission had changed and only one of the Commissioners (Commissioner Anderson) who had participated in the Commission's earlier decision remained on the Commission. On this second appeal to the Commission, much of the evidence introduced on the remand was challenged as incompetent or immaterial. The Commission concluded that the challenged evidence was unnecessary to its decision, and, with Commissioner Anderson dissenting, upheld the examiner's order.[4] In its view, the legal principles under which the sales commission plans were held unlawful in *Goodyear* and *Firestone* were equally applicable to the *Goodrich* record, even without the challenged evidence (*B. F. Goodrich Co.*, Docket 6485, order issued April 15, 1963).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed and ordered that the complaint be dismissed.[5]

[3] In *Firestone* the Commission did consider market share data relating to the entire market for TBA, including data relating to other outlets for TBA other than service stations, and other methods of distributing TBA other than sales commission plans. But none of this information was present in *Goodyear*, and so presumably this was not the kind of "market data" deemed critical by the Commission to a finding of illegality.

[4] We agree that the evidence challenged on the second appeal to the Commission is unnecessary to our decision and have stricken the Findings and Conclusions of the hearing examiner based upon it.

[5] *Texaco, Inc. v. F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964).

After holding that Chairman Dixon was barred from participating in the decision of the case, the Court of Appeals went on to reject the Commission's decision on the merits. It rejected the examiner's finding that Texaco employed coercive tactics and then held that "the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA." (336 F. 2d at 762). Instead, it found that Texaco dealers "are quite free to accept or reject" the oil company's "recommendation" to purchase sponsored TBA products (*Id.* at 763).

[9458] The fundamental premise underlying this conclusion was the Court of Appeals' finding that there was "no basis in this record for the Commission's conclusion that Texaco has controlling economic power over its dealers" and that Texaco's "contracts with [its] dealers do not give rise" to an inference that it did. (*Id.* at 762.) In the court's view, the "promotional services" performed by Texaco were indistinguishable from, and no less lawful than, conventional salesmanship to wholly independent purchasers.

This approach conflicted with that of the Court of Appeals for the Seventh Circuit, which affirmed the Commission's order in *Goodyear*.[5] For the Seventh Circuit the starting point for any realistic assessment of the nature and competitive effect of an oil company's "recommendations" under the sales commission plan was the economic power which the oil company possessed over its dealers and which derived from the contractual relationship between them. In its view, the "heart of this case is the economic power Atlantic possesses over its service station dealers" (331 F. 2d at 400). Such power was not at all dependent upon coercive tactics.[6] Rather, the "keystone" to [9459]

[5] *Goodyear Tire & Rubber Co.* v. *F.T.C.*, 331 F. 2d 394 (7th Cir. 1964).

[6] The Seventh Circuit upheld the Commission's finding of coercion; the District of Columbia Circuit rejected it. The evidence of coercion in *Texaco* was no less substantial than that in *Atlantic-Goodyear*. The different results on appeal appear attributable to two factors: (1) the Seventh Circuit deferred to the hearing examiner's assessment of the witnesses' credibility, and (2) while only a few dealer witnesses testified to coercive tactics and a considerably larger number of dealers called by respondents testified to the contrary, the Seventh Circuit thought the hearing examiner correctly evaluated the entire testimony in light of the economic dependency of dealers upon the oil company. Review in the Supreme Court of the finding of coercion was not sought in *Atlantic*. To the extent respondents seek to distinguish

that power could be found in the "lease and equipment loan contract with their short term and cancellation provisions." (*Ibid.*) Viewed in the context of these provisions, the "service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice." (*Ibid.*) Reaching an opposite conclusion from that of the District of Columbia Circuit in *Texaco*, the Seventh Circuit held (*id.* at 401):

> "Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion; the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.
>
> "Atlantic says that its influence over its dealers to purchase sponsored TBA short of force, threat, or intimidation is lawful; that it may recommend high quality TBA to its dealers; and that such action serves a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealers' economic dependency upon the oil company. In that setting, recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats."

[9460] Supreme Court review was sought in both *Texaco* and *Atlantic-Goodyear*. The Commission, arguing that different dispositions of the two cases based upon narrow factual distinctions would be inappropriate, framed the issue presented by both cases in identical, broad terms, asking the Court to hold that:

> "[I]t is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a

this case from *Atlantic* on the presence or absence of coercion, we conclude that no such factual distinction exists. We do not disturb the examiner's finding of coercion which was based essentially on his assessment of the credibility of the witnesses. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494-96. However, as we point out below, the fundamental issue here—the legality of sales commission agreements between major oil and major rubber companies—does not turn on a finding of coercion, and we do not rest our decision upon it.

> major rubber company and a major oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers."[7]

In both cases the Commission urged the same broad rationale reflected by the Commission and Seventh Circuit decisions in *Goodyear:* (1) Because of the gasoline dealer's singular dependence upon, and subservience to, his major oil company supplier, the oil company had the power to require its dealers to purchase substantial quantities of TBA without overt coercion; (2) the promotional services which the oil company was obligated to, and did, perform under the sales commission agreement constituted the exercise of that power for the benefit of the sponsored TBA supplier; and (3) as a result, the effect of the sales commission plan is like that of a tying agreement, foreclosing competing non-sponsored suppliers from the substantial market of the sponsoring oil company's dealer.[8]

[9461] The Supreme Court reviewed the *Atlantic-Goodyear* case for the purpose of resolving the "apparent conflict" with *Texaco* (381 U.S. at 363). The Court affirmed the Seventh Circuit's decision, and a week later vacated the judgment of the District of Columbia Circuit in *Texaco* and ordered that the case be remanded to the Commission for reconsideration in light of the decision in *Atlantic* (*F.T.C. v. Texaco, Inc.*, 381 U.S. 739).

II

We turn then to the threshold question in this remand proceeding: What light is cast by the Supreme Court's decision in *Atlantic* upon the appropriate disposition of this case?

Reading its opinion against the background set forth above, we can draw only one conclusion: In upholding the Seventh Circuit and Commission decisions, the Supreme Court approved their broad rationale, rejected the approach taken by the District of Columbia Circuit in this case, and enunciated a rule which transcends the confines of the particular facts involved

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[7] *F.T.C. v. Texaco, Inc., supra*, Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, p. 2; *Atlantic Refining Co. v. F.T.C., supra*, Brief for the Federal Trade Commission, p. 2.

[8] *Atlantic Refining Co. v. F.T.C., supra*, Brief for Federal Trade Commission, pp. 32–34; *F.T.C. v. Texaco, Inc., supra*, Petition for a Writ of Certiorari, pp. 16–19.

in *Atlantic*. In the Court's view, while coercive practices aggravate the restraint imposed by the sales commission plan, it is the oil company's power over its dealers, derived from the contractual relationship between them, and the utilization of that power through the performance of the promotional services required by the sales commission agreement, which renders the sales commission plan unlawful.

The starting point for the Supreme Court's analysis, like the Seventh Circuit's, is reflected in its emphasis upon the oil company's considerable economic power over its dealers. The Court said (381 U.S. at 368):

> "[Atlantic and its dealers] simply do not bargain as equals. Among the sources of leverage in Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last term we described the power implications of such arrangements in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), and we need not [9462] repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage. *United States* v. *Loew's, Inc.*, 371 U.S. 38, 45 (1962). * * *"

In this context, "threats and coercive practices" merely "bolstered" the "lever" which resulted from this economic power (*id.* at 369). The Court viewed the oil company's aggressive and vigorous salesmanship in carrying out the sales commission plan, wholly apart from any coercive tactics, as an exertion of "the persuasion that is a natural incident of its economic power" (*id.* at 368), rather than as the "recommendations" of a salesman to an independent purchaser "free to accept or reject" them.

Accordingly, the Court accepted the Commission's and the Seventh Circuit's characterization that the sales commission contract, which obligated the oil company to use its power over its dealers to sell the sponsored rubber companies' TBA, had the same "central competitive characteristic" as a tying agreement—"the utilization of economic power in one market to curtail competition in another". (*Id.* at 369.) Indeed, in the Court's view, that was its primary if not sole purpose. Under the sales commission plan (as the records in both *Atlantic* and *Texaco* show), the oil company, without making any investment in dis-

tributional facilities or TBA inventory, and without relieving the TBA supplier of the burden of sales, distribution, and service, is nevertheless paid large commissions for its promotional efforts. Accordingly, the Court found that "it is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers * * *" (*id.* at 376).

In sum, the Supreme Court, in upholding the Commission's order prohibiting outright the use of the sales commission plan by Atlantic and Goodyear, was also affirming the rationale [9463] of the Commission's decision, which the Court described as follows (*id.* at 361):

> "[T]he Commission considered the coercive practices to be symptomatic of a more fundamental restraint of trade and found *the sales-commission plan illegal in itself* as 'a classic example of the use of economic power in one market * * * to destroy competition in another market * * *'." [Emphasis supplied.]

At the same time the Supreme Court dispelled the ambiguities generated by the Commission's first decision in this proceeding. An assessment of the competitive effects of the sales commission plan does not require an analysis of "market data." Since the testimony only confirmed what was essentially implicit in the relationhip between the oil company and its dealers—that the oil company's sponsorship under the sales commission plan has the competitive effect of foreclosing non-sponsored TBA suppliers from access to the market represented by the oil company's dealers—further market analysis is unnecessary. It is sufficient to show that a "not insubstantial portion of commerce is affected".[a]

[9464] To be sure, the Supreme Court took note of the striking demonstration in *Atlantic* of both the extreme abuses attending Atlantic's use of the sales commission plan, and the dramatic effectiveness of the plan in foreclosing non-sponsored

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[a] The Court said in this regard (*id.* at 371):

"Goodyear and Atlantic contend that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories. But just as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale economic analysis of competitive

TBA suppliers from the Atlantic service station market. *Atlantic* was the first case before the Court involving a challenge to the sales commission plan; it presented for review a Commission decision whose rationale would render unlawful the sales commission plans themselves, whenever used by major oil and rubber companies. The Court, therefore, made a careful examination of the entire record to assess the "economic and business stuff out of which these arrangements emerge", so as to determine whether they are "naked restraints of trade with no purpose except stifling of competition" and whether "they may be too dangerous to sanction" (*White Motor Co.* v. *United States*, 372 U.S. 253, 263). But, like the Commission, the Court looked upon the dramatic aspects of *Atlantic* as "symptomatic" of a broader problem. Having examined, as reflected by the record in *Atlantic*, the dangers presented by sales commission plans, their essentially anti-competitive character, and the vivid demonstration of the abuses which may attend their use, the Court concluded more generally that the sales commission plan itself "amount[s] to a device that permits suppliers of tires, batteries and accessories, through the use of oil company power, to effectively sew up large markets" and, as such, could not be defended even though it might be an efficient and economic method of distribution (381 U.S. at 371). Consequently, the Court's ultimate concern was not limited to the sales commission plan involved in *Atlantic*, but was rather with "the destructive effect on commerce that would result from the widespread use of these [sales commission] contracts by major oil companies and [TBA] suppliers" (*ibid.*).

The Court's concern in *Atlantic* with the dangers presented by the "widespread use" of the sales commission plans by major oil and TBA suppliers is especially significant. *Atlantic* was not, as the Court was well aware, an isolated case. In *Texaco*, in which a petition for certiorari was pending at the time of the Court's decision in *Atlantic*, the record showed that Texaco entered into sales commission plans with three of the leading rubber companies—Goodrich, Firestone and, under an agree-

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effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected."

Atlantic had indeed based its contention that a more extensive economic analysis was necessary, in part, upon the Commission's first decision to remand *Goodrich-Texaco* to take evidence of "market data" for an assessment of the competitive effects of the sales commission plan. *Atlantic Refining Co.* v. *F.T.C.*, *supra*, Brief of Petitioner The Atlantic Refining Company, pp. 31–32, 57, n. 48.

ment instituted about the time this proceeding began, U.S. Rubber Company. Goodrich also had sales commission plans with [9465] Continental Oil Company and other oil companies as well. The *Firestone* and *Goodyear-Atlantic* cases show that both Goodyear and Firestone have sales commission plans with Shell and Atlantic; that in addition, Goodyear has sales commission plans with Sinclair Refining Company, Richfield Oil Company, and a number of other oil companies; and that Firestone, in addition to its sales commission plan with Texaco, has sales commission arrangements with Union Oil Company, Continental Oil Company, and others.

The service station dealer outlets affected by these sales commission plans constitute a vast market for the sale of TBA; and at the same time only the largest rubber companies are the beneficiaries of the marketing advantages derived from the sales commission plans, a fact which would appear to confirm the Commission's finding in *Atlantic* that smaller TBA suppliers are unable to utilize the sales commission arrangement (58 F.T.C. at 367). Given the Court's view of the fundamentally anticompetitive character of the sales commission plan when used by oil companies possessing power over their dealers, the proliferation of these plans between major oil companies and major rubber companies constitutes in itself an acute danger for competition. It was in this context that the Court, looking beyond *Atlantic*, and the specific facts involved there, concluded that generally the use of the sales commission plan by major oil companies and major rubber companies, whatever its economic advantages, is a practice "too dangerous to sanction".

This conclusion is buttressed as much by what the Court did, as by what it said. The Court's affirmance of the Commission's order prohibiting outright the use of sales commission plans by Atlantic and Goodyear not only between themselves but with other companies had broad competitive consequences in both the TBA and petroleum markets. If the Court's decision were to be read as limiting the Commission in its evaluation of other sales commission plans to the specific factual circumstances involved in *Atlantic*, one major oil and one major rubber company would be prohibited not only from further engaging in coercive tactics, but from using a sales commission plan which its major competitors might still be free to use.

[9466] For example, at the present time, it would appear that three of the largest rubber companies, Goodrich, Firestone, and

U.S. Rubber, use sales commission plans providing Texaco sponsorship to promote their TBA products to Texaco's dealers. Yet, Goodyear could not ask Texaco (even assuming that Texaco has demonstrated no propensity to use coercive tactics in performing its other sales commission plans) to perform for it the same promotional service which Texaco performs for Goodyear's three major competitors. At the same time, Texaco, one of the largest oil companies, without making any investment in distributional facilities or TBA inventory, receives substantial commissions for the sale of TBA products to its service stations. Atlantic, a major oil company but substantially smaller than Texaco, is barred from the same economic opportunity, no matter how scrupulously it might refrain from coercive tactics in the future. Yet, the same kinds of leases, equipment loan contracts, and sales agreements stressed by the Court in *Atlantic* also render Texaco dealers economically subservient to, and dependent upon, Texaco; and its sales commission plans require Texaco to perform the same kind of vigorous promotional campaign described in *Atlantic*. To bar only Atlantic and Goodyear from the use of the sales commission plan would thus not only create a harmful competitive imbalance among the leading firms of the two industries, it would be arbitrary and inequitable.

The Supreme Court was informed of the harmful and anomalous consequence of a rule confined to the particular facts of *Atlantic*.[10] We find nothing which would permit us to read [9467] the Court's opinion, or its remand order in this proceeding, as sanctioning such results.

[10] The Government in its petition for certiorari in *Texaco* told the Court: "Even if the cases [Atlantic and Texaco] could be distinguished on their facts, the conflict, if unresolved, would create an anomalous situation in which one major oil company and a large tire company were permitted to employ essentially the same marketing practice that their competitors were prohibited from using."

F.T.C. v. Texaco, Inc., 381 U.S. 739, Petition for a Writ of Certiorari, p. 12.

Similarly, Atlantic told the Supreme Court that:

"The order in each of the two cases represents a rule of general application, not the disposition of an isolated controversy. The rule should be uniform throughout the industry. Moreover, Atlantic and Texaco are competitors; and Atlantic, the smaller company, should not be under a marketing handicap as against Texaco, which is three times larger."

Atlantic Refining Company v. F.T.C., supra, Brief of Petitioner The Atlantic Refining Company, p. 34.

III

In our view the Supreme Court's decision in *Atlantic* compels the conclusion that the Texaco-Goodrich plan is an unfair method of competition and that Texaco and Goodrich should be prohibited, as were Atlantic and Goodyear, from performing or entering into any other sales commission plans. The Court's concern for the dangers which derived from a widespread use of the sales commission plan is especially relevant here. As has been pointed out, Texaco is considerably larger than Atlantic. Its service station dealers constitute an even more significant TBA market. Stations operated by Texaco's lessee dealers[11] and contract dealers[12] [9468] constituted 16.5% of the service stations in the United Stations in the year 1955. In that year, Texaco had approximately six times as many contract and lessee dealers in Atlantic.[13]

Moreover, as we have noted, in *Atlantic* the total sales to Atlantic dealers of Goodyear and Firestone products for the six-year period June 1950–June 1956 amounted to about $50 million. Goodrich and Firestone sold almost $60 million in TBA products to Texaco dealers in the year 1956 alone. In the five-year period 1952–1956, the sales of the sponsored Goodrich and Firestone TBA to Texaco amounted to approximately $245 million.

The economic dependence of Texaco dealers is no different from that of Atlantic dealers. Thus, Texaco lessee dealers, who constitute the most important segment of service station TBA outlets, have the same kind of short term leases, renewable on a year-to-year basis and terminable at year's end upon ten days' notice of either party. These leases contain the same kind of general "housekeeping" requirements concerning the station's use, maintenance and appearance which, if breached, can result in immediate cancellation by Texaco without notice to the lessee. The lessees have often made a considerable investment

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[11] A lessee station (referred to as a C station) is one that is either owned or leased by Texaco and in turn leased by it to the dealer.

[12] A contract station (referred to as D stations) is either owned by the operator or leased by him for someone other than Texaco. In addition to selling gasoline directly through C and D stations, Texaco sells indirectly through consignees (B accounts) and independent distributors (E accounts), who operate bulk storage plants, purchase Texaco products and sell them to service station dealers and consumers.

[13] In 1955 Texaco had approximately 30,000 contract and lessee dealer stations; Atlantic had approximately 5,000 service stations. 381 U.S. at 363.

in their stations, at times, on funds borrowed from Texaco. "Contract dealers", who own their stations or lease them from third parties, nevertheless lease their pumps and other equipment from Texaco. Both lessee and contract dealers purchase their gasoline pursuant to an "Agreement of Sale", prescribing annual minimum and maximum purchases at current Texaco prices. These "Agreements of Sale" also are generally on a year-to-year basis, terminable at year's end upon thirty days' notice, and automatically cancelled if a lessee dealer's lease is terminated.

In these circumstances, the competitive advantage given a TBA supplier whose products are sponsored by Texaco need [9469] hardly depend upon the use of overtly coercive tactics. Here, as in *Atlantic*, Texaco's "promotional" efforts in carrying out its sales commission agreement with Goodrich and Firestone constitute a forceful exercise of its economic power over its dealers. Its consequence is to impress upon Texaco dealers, through constant repetition and in a variety of ways, that Texaco, whose favor the dealer must court, has a strong interest in their purchase of the sponsored TBA products.

Even before the dealer has been accepted, Texaco begins its campaign on behalf of the sponsored TBA products. Texaco personnel, when interviewing prospective dealers for new or established service stations, advised them of the importance of TBA, recommending the TBA products of Goodrich and Firestone. Once the dealer is selected, and before he opens his station, Texaco frequently informs Goodrich and Firestone of the prospective opening of his station, affording Goodrich and Firestone a headstart over competitors in the initiation of their own sales campaign on behalf of their products. Thereafter, Texaco, often with the direct assistance and participation of the rubber companies, maintains a continuous campaign designed to induce the dealer to purchase the sponsored TBA products. Dealer meetings and training courses designed to educate the dealer in the use of TBA products utilize the products of the sponsored companies. Texaco participates in the sponsored companies' seasonal and special sales, promotional and advertising campaigns. Texaco publications sent to its dealers carry displays of the sponsored TBA products. And, perhaps most effective of all, the Texaco salesman continually carries the message in his day-to-day contacts with the dealers. In this regard, it is important to remember that these Texaco salesmen who are most directly involved in pushing the sponsored TBA products,

also play a critical role in the annual dealer evaluations and in the determination of whether the dealer's lease and contractual relations with Texaco are to be renewed. At the same time, Texaco, in making promotions, evaluates these salesmen's performances in part by their success in selling sponsored TBA products.

Frequently, both the Texaco and rubber company salesmen call upon the dealer together ("double teaming"). The Supreme Court in *Atlantic* noted the inherently coercive effect of that [9479] device, pointing out that since "the annual dealer evaluation by Atlantic salesmen carried substantial weight when the district managers decided upon annual lease extensions * * * dealers were * * * understandably susceptible to the encouragement of Goodyear salesmen when Atlantic men were nearby looking over their shoulders" (381 U.S. at 375). And, as in *Atlantic*, each dealer's performance as a purchaser of sponsored TBA is also fully disclosed by the reports furnished by the sponsored rubber companies to Texaco of the amount of sponsored TBA purchased by each dealer. As the record indicates, Texaco, in assessing the economic success of service stations, was vitally concerned with the amount of sponsored TBA sold by its dealers.

Here, as in *Atlantic*, there was substantial testimony by non-sponsored TBA suppliers confirming the conclusion that, as a result of Texaco's vigorous sales campaign to its dealers, many Texaco dealers were left with the impression that Texaco would look with disfavor upon their purchase of non-sponsored TBA products and that they were required to purchase the sponsored TBA. As a result, these non-sponsored suppliers were unable to gain access to these Texaco service station outlets. In sum, the Supreme Court's characterization of the operation of the sales commission plan in *Atlantic* is equally applicable here. Texaco, with Goodrich's "encouragement and assistance, has marshalled its full economic power in a continuing campaign to force its dealers and wholesalers to buy [Goodrich] products" (*id.* at 371).

Respondents argue that there are a number of factual distinctions between this case and *Atlantic*. But as we read *Atlantic* none of these distinctions is material. As already demonstrated, under *Atlantic* it is the oil company's power over its dealers, and the exercise of that power through the performance of the promotional services required by the sales commission agreement, and not coercive tactics, which condemns the

sales commission plan. And while, unlike *Atlantic*, the sales commission plans involved here did not allocate territories between the sponsored TBA suppliers, the gravest danger to competition presented by the sales commission plans here as in *Atlantic* is in their capacity for hindering competition between sponsored and non-sponsored TBA suppliers. A device which may enhance the position of two or three leading TBA suppliers vis-a-vis smaller competitors cannot be defended on the ground that it still leaves these few firms free to "compete" with one another for access to the Texaco service station market.

[9471] Respondents also argue that, unlike *Atlantic*, there is here no showing that Texaco's promotional campaign was effective. Thus, they contend that the statistics show that only about 30% of Texaco's dealers purchased sponsored TBA products. This figure, however, is derived by considering the number of Texaco dealers purchasing sponsored TBA in proportion to the total number of lessee and contract dealers. In fact, however, as respondent Goodrich, itself, points out, "many contract dealers do not handle, and are not appropriate outlets for, TBA products. Since more than half of the total number of Texaco dealers are made up of contract dealers, the actual success of Texaco's sales commission plans would appear to be considerable indeed. But, under *Atlantic*, proof of the actual effectiveness of the sales commission plan is unnecessary. The Court's ultimate concern was with the cumulative danger presented by the "widespread use" of the plans, rather than the relative effectiveness of particular plans. Moreover, the Court viewed the sales commission plan when used by a major oil company as having the same competitive characteristics as a tying agreement. As in the case of a tying agreement, the fact that the sales commission plan has not fully achieved its purpose, or that non-sponsored suppliers can overcome the unfair competitive advantage which the sales commission gives the sponsored supplier, is no defense. Cf. *International Salt Co.* v. *United States*, 332 U.S. 392, 397; *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 12; *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832, 839 (4th Cir. 1960), cert. denied 366 U.S. 963.

In essence, respondents urge upon us the rationale of the District of Columbia Circuit's opinion—that despite the eco-

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"Brief of Respondent The B. F. Goodrich Company, in Answer to Appeal Brief of Counsel Supporting the Complaint, dated March 23, 1960, p. 28.

nomic dependence of the Texaco dealer upon Texaco, Texaco's vigorous promotional activities under the sales commission plan are nothing more than the "recommendations" of a salesman to a purchaser "free to accept or reject" them. In affirming the Seventh Circuit's decision in *Atlantic*, the Supreme Court rejected that position.

IV.

We think that orders against both Texaco and Goodrich, identical with the orders against Atlantic and Goodyear which were affirmed by the Supreme Court, are appropriate here. [9472] Texaco should clearly be enjoined from entering into or performing any sales commission plan. As to Goodrich, like Goodyear, it was "no silent or inactive partner in the implementation of the sales-commission plan" (381 U.S. at 373). As the record demonstrates, the sales commission plan here is essentially a joint effort in which the massive power of a major rubber company and a major oil company is united, to the disadvantage of non-sponsored competitors, behind the sale of the rubber company's TBA products. Goodrich now has sales commission plans with five other oil companies: Continental, Shell-American, Jenney, Ohio Oil and Emblem. Its sales commission plans with these companies are substantially the same as those it has with Texaco. There is nothing in this record to indicate that these oil companies do not also have the kind of economic power possessed by Texaco over its dealers. We would not be justified in concluding that any of these other plans, unlike Goodrich's plan with Texaco, was not an attempt to buy the economic power of the oil company over its dealers in order to obtain an unfair competitive advantage over competing rubber companies. The order therefore prohibits Goodrich from entering into or carrying out any sales-commission plan. If Goodrich should come forward with facts establishing that it has a sales commission plan with any oil company which does not possess economic power over its dealers, the proceeding can always be reopened for such modification of the order as may be warranted. See *Atlantic Refining Co.* v. *F.T.C.*, *supra*, at 377.

Chairman Dixon and Commission MacIntyre did not participate in this decision.

January 14, 1966.

FINAL ORDER OF THE COMMISSION

[9450] (January 14, 1966)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
PHILIP ELMAN
EVERETTE MACINTYRE
JOHN R. REILLY
MARY GARDINER JONES

[SAME TITLE]

By its order dated June 16, 1965, the Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings in conformity with the opinion of the Supreme Court herein dated June 7, 1965. Pursuant thereto, the Commission heard oral argument and received written briefs, and fully considered, on the basis of the entire record, all questions of fact and law presented by the appeals from the hearing examiner's revised initial decision of September 24, 1962. For the reasons stated in the accompanying opinion of the Commission,

It is ordered that:

A.

The revised initial decision of the hearing examiner be, and it hereby is, modified as follows:

[9451] (1) Findings 10(b), 32, 33, 34, and conclusion 7 are stricken.

(2) The first sentence of finding 8 is deleted, and the following is substituted therefor: "Tires, batteries, and accessories have become a necessary and integral part of the business operation of the ordinary Texaco dealer, and in particular for Texaco's lessee dealers."

(3) The last sentence of finding 20 is deleted and the following is substituted therefor: "It would be unusual to expect that a Texaco salesman would vigorously insist to a dealer that he

had a right to buy wherever he might wish when Texaco's evaluation of the salesman's performance was in part based upon his success in selling sponsored TBA products to the dealer."

(4) The second sentence in finding 26 is deleted, and the following is substituted therefor: "There are written contracts with Texaco, Conoco, and Ohio-Marathon, but there are no formal contracts with the other three oil companies, which are smaller local concerns. Shell-American and Jenney operate generally with only service station customers selling at the retail level, but without wholesale outlets such as consignees, jobbers, and distributors."

(5) The second sentence in finding 30 is deleted, and the following is substituted therefor: "From 1952 to the end of 1955, the number of Conoco leased stations increased from 1,138 to 1,765.[1] "

(6) The last sentence of finding 31, and the chart immediately below, are deleted, and the following substituted therefor: "Outlets of the additional oil companies having sales commission contracts with Goodrich during the years 1953–55 were as follows:

[9452]

	12–31–53	12–31–54	12–31–55
Conoco	1061	1272	1508
Shell-American	53	66	60
Jenney Mfg.	138	188	201
Ohio Oil	594	666	804
Emblem	30	9	25
	1876	2201	2598[2]"

(7) The first sentence of conclusion 5 is deleted, and the following is substituted therefor: "Practically all of the representatives of the competitors of Goodrich called as witnesses testified generally that they had difficulty in selling TBA to Texaco stations and testified specifically as to the reasons given by certain Texaco dealers for not buying or selling their TBA items."

B.

The hearing examiner's revised initial decision of September 24, 1962, as hereinabove modified and supplemented by the accompanying opinion, and the order contained in said revised initial decision be, and they hereby are, adopted as the decision and order of the Commission.

C.

The respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form of their compliance with this order.

By the Commission, Chairman Dixon and Commissioner MacIntyre not participating.

SEAL

/s/ JOSEPH W. SHEA
Secretary.

Issued: January 14, 1966.

PREHEARING STIPULATION IN LIEU OF PREHEARING CONFERENCE

(April 26, 1966)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20058

TEXACO INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 20061

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

Subject to the Court's approval, the parties hereby stipulate and agree as follows with respect to the issues and other procedures.

I

ISSUES

Petitioners Texaco Inc. (hereinafter "Texaco") and The B. F. Goodrich Company (hereinafter "BFG") have filed separate petitions to review and set aside an order of the Federal Trade Commission (hereinafter sometimes referred to as "the Commission") individually directed to each petitioner, which, among other things, would ban their participation in all sales commission arrangements, present or future, whether between themselves or with others, in connection with the distribution of tires, batteries and automotive accessories (hereinafter "TBA") purchased by distributors and dealers of marketing oil companies.

The parties, having met and attempted to reach agreement on issues, but being unable to do so, submit the following.

Petitioners Texaco and BFG contend that the issues on review are as follows:

1. Whether the Commission's Order can stand under the facts of this case in light of the Supreme Court's decision in *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965); and, in any event, whether that portion of the Order enjoining coercion can stand in view of the fact that Texaco did not coerce its dealers to purchase sponsored TBA (as found by this Court on the prior appeal in this proceeding); and

2. Whether Texaco and BFG are correct in maintaining that:

(a) The Order, and the opinions, findings and conclusions upon which it is based, are arbitrary, capricious, not in accordance with law, without statutory authority, unsupported by reliable, competent, probative or substantial evidence, unwarranted by the facts and founded upon erroneous inferences, incompatible with the record as a whole, contrary to the Supreme Court's decision in the *Atlantic* case, and were entered in violation of the requirements of due process of law and are in disregard of the provisions of the Federal Trade Commission Act, the Administrative Procedure Act and the mandates of the Supreme Court and of this Court in this matter.

(b) The Commission has wholly failed to make any findings of fact to support certain of its conclusions and has failed to inform the reviewing courts and the parties by an adequate and proper statement of its findings and conclusions as to the legal and factual basis for its order, all as required by statute and necessary to due process;

(c) Since the Commission expressly excluded from its consideration the matters officially noticed during the remand hearings in 1962 and since this left nothing before it but the prior record which it had held to be insufficient to support the complaint, the Commission exceeded its jurisdiction and authority in not dismissing the complaint;

(d) The decision of the Commission issued January 14, 1966, approving the conclusion that Section 5 had been violated, is in irreconcilable conflict with the Commission's opinion of March 9, 1961 upon the identical record. By reaching diametrically opposed results upon the identical record, without explanation and only by virtue of having unreasonably prolonged

the trial of this matter to the injury of Texaco and BFG, the Commission has acted in disregard of the requirements of the Administrative Procedure Act, has abrogated its functions under the Federal Trade Commission Act, and has denied Texaco and BFG due process;

(e) The evidence in the record will not support the conclusion that any sales commission agreement between Texaco and Goodrich or between Texaco and any other company or between Goodrich and any other company or any practices of Texaco or Goodrich pursuant to such agreements constitute an unfair method of competition or an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. In particular there is no substantial, probative, competent or reliable evidence of (a) coercion; (b) the existence of and/or the employment of economic power by Texaco to cause Texaco dealers involuntarily to purchase substantial amounts of TBA; (c) the existence of and/or employment of economic power by any other oil company having sales commission arrangements with BFG to cause their dealers involuntarily to purchase substantial amounts of TBA; and (d) adverse competitive effects or any injury to competition;

(f) The record affirmatively establishes that the sales commission plan of distributing TBA as used by Texaco and BFG is a lawful selling method and is not in restraint of trade, is not an attempt to monopolize or a conspiracy to monopolize trade in TBA, does not involve a tie-in or exclusive dealing, is not an unfair method of competition or an unfair or deceptive act or practice in commerce in violation of Section 5 of the Federal Trade Commission Act and is not in violation of any law;

(g) Texaco and BFG have been denied procedural due process and subjected to violations of the Administrative Procedure Act and the Commission's own rules;

(h) The Commission's interpretation and application of Section 5 of the Federal Trade Commission Act in this proceeding violate the Fifth Amendment to the Constitution and render that statute an improper delegation of legislative authority, without any adequate standards, and are, further, contrary to every existing expression by Congress, the courts and the Commission itself as to the meaning and applicability of the statute;

(i) In addition to all of its other infirmities, the Commission's order cannot stand because it is unjustifiably broad in

reaching acts and practices not engaged in by Texaco or BFG and not relied upon by the Commission as a basis for its decision.

Respondent, the Federal Trade Commission, does not agree with the issues as stated by peitioners. It believes the issues on review to be as follows:

1. Whether it is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a rubber company to enter into an agreement with an oil company possessing controlling economic power over its dealers, under which the oil company, in return for a commission, promotes the sales to its dealers of the rubber company's products. To the extent that questions may be raised and argued by petitioners, this issue will include, *inter alia*, questions (a) as to whether Texaco Inc. does possess controlling economic power over its dealers, (b) whether the sales commission system gives the rubber company an unfair competitive advantage, having a tendency and capacity to restrict, restrain, or lessen competition and being in nature and effect an illegal tying arrangement, and (c) whether Texaco has overtly coerced dealers to carry sponsored TBA.

2. Whether the Commission abused its discretion in its choice of remedy. This issue will include the question of whether, having found that the sales commission agreement between petitioners Texaco Inc. and The B. F. Goodrich Company violated Section 5, the Commission abused its discretion by not merely prohibiting the petitioners from continuing or having such an agreement with each other, but by also prohibiting each petitioner from entering into or performing any similar agreement with any other company.

3. Whether the Commission's proceedings, findings and decision comply with the mandates of the Supreme Court and of this Court, the provisions of the Constitution, the Administrative Procedure Act, and the Federal Trade Commission Act. This issue includes the question whether petitioners have been denied due process of law. Depending upon the particular questions pursued by petitioners under this issue, an additional issue may be included as to whether such questions have been properly raised before the Commission so as to have preserved petitioners' right to raise them before this Court, as well as the extent to which such questions may be precluded by the nature of the Supreme Court's order of remand in this case.

II

Procedures and Schedules With Respect to Printing of Joint Appendix and Briefs, and Use of Unprinted Portions of the Record

The record here embodies more than 4400 pages of transcript testimony, nearly 4000 pages of exhibits and numerous orders, rulings, opinions and other legal papers. All parties place heavy reliance upon detailed consideration of the evidence, necessitating the designation of substantial portions of the record in the joint appendix required by Rule 16(a) of this Court.

Fortunately, a substantial portion of the record has been printed in a single joint appendix filed in this Court in or about February 1964, on the prior appeals before this Court in this proceeding (Nos. 17915 and 17923). Accordingly, all parties stipulate and agree that the 1964 joint appendix, together with a supplemental joint appendix to be comprised of those relevant legal papers added to the record after the filing of said 1964 joint appendix, shall constitute the printed joint appendix on this appeal.

The parties are undertaking to designate promptly for inclusion in the supplemental joint appendix those papers and other materials deemed by one or more of the parties to be pertinent, material and helpful to this Court in disposing of the petitions. It is anticipated that the supplemental joint appendix will be printed in time for filing with petitioners' appeal brief pursuant to the schedule hereinafter set forth for the consideration and approval of this Court.

The parties further stipulate and agree that the respondent may file a single answering brief.

Inasmuch as the briefing requirements of the parties will extend into the summer months, all parties, in accordance with Rule 18(f) of this Court, stipulate and agree, and hereby respectfully request the Court's approval, for the following briefing schedule which, it is believed, will not delay the assignment of the appeals for oral argument:

1. The petitioners shall file their appeal briefs not later than June 30, 1966.

2. The respondent shall file its answering brief, which may be in typewritten or mimeographed form, not later than August 18, 1966, with printed brief to be filed no later than August 29, 1966.

3. The petitioners shall file their reply briefs, if they so elect, not later than September 12, 1966.

It is further agreed that any party, in a brief or at the hearing in the case, may refer to and rely upon any portion of the original transcript herein which has not been printed to the extent that such portion may be material to the issues, it being understood that any portion of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

Respectfully submitted,

JAMES O. SULLIVAN

Amzy B. Steed
James O. Sullivan
Office and P.O. Address
135 East 42nd Street
New York, New York 10017

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By MILTON HANDLER
Milton Handler
A Member of the Firm
Office and P.O. Address
425 Park Avenue
New York, New York 10022

ROYALL, KOEGEL & ROGERS

By
Frederick W. P. Lorenzen
A Member of the Firm
Office and P.O. Address
200 Park Avenue
New York, New York 10017

Attorneys for Petitioner
Texaco Inc.
WHITE & CASE

By EDGAR E. BARTON
Edgar E. Barton
A Member of the Firm
Office and P.O. Address
14 Wall Street
New York, New York 10005

STANLEY L. TEMKO
Stanley L. Temko
Office and P.O. Address
Union Trust Building
Washington, D.C. 20005

Attorneys for Petitioner
The B. F. Goodrich Company

ALVIN L. BERMAN
Alvin L. Berman
Attorney for Respondent
Federal Trade Commission

Washington, D.C.

April 26, 1966.

ORDER OF COURT OF APPEALS

(May 2, 1966)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

No. 20058

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 20061

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Before: Tamm, Circuit Judge, in Chambers

ORDER

Counsel for the parties in the above-entitled cases having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, except as hereinafter provided, and it is

Further ordered that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein, and it is

Further ordered, sua sponte, that the above-entitled cases are consolidated for all purposes, and that the joint appendix filed by the parties in cases numbered 17,915 and 17,923 shall be treated as part of the joint appendix in the above-entitled cases, and it is

Further ordered that the times for filing the briefs and joint appendix of the parties is fixed as follows:

Petitioners' briefs shall be filed on or before June 23, 1966.

Respondent's consolidated brief shall be filed on or before August 2, 1966.

Petitioners' reply briefs, if any, and the joint appendix of the parties shall be filed on or before August 22, 1966.

The parties may file their briefs in typewritten or mimeographed form, provided that the printed briefs and joint appendix shall be filed on or before August 22, 1966.

References to the record appearing in the briefs of the parties may, if the parties so desire, be to the page numbers in the original record certified to this court, provided that in the printing of the joint appendix there shall be set forth, in addition to the consecutive numbering of the pages of the joint appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the court to locate the pages referred to in the briefs.

Federal Trade Commission Docket 6485, United States Court of Appeals For the District of Columbia Circuit

No. 20058

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 20061

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petitions to Review an Order of the Federal Trade Commission

Decided September 25, 1967

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and BURGER, *Circuit Judge.*

BURGER, *Circuit Judge:* Eleven years after the issuance of a complaint and sixteen years after an investigation was initiated,[1] this case returns to us from the Federal Trade Commission for the second time; in the interim, following our prior review, the Supreme Court remanded for further consideration. *See Texaco, Inc.* v. *F.T.C.*, 118 U.S. App. D.C. 366, 336 F. 2d 754 (1964), *remanded,* 381 U.S. 739 (1965).

In 1956 the Federal Trade Commission brought proceedings against major oil and rubber companies, simultaneously instituted by substantially identical complaints, alleging as an unlawful method of competition prohibited by Section 5 of the Federal Trade Act, 38 Stat. 719 (1914), 15 U.S.C. § 45 (1946), the sales commission method of distributing tires, batteries, and accessories, called the "TBA" plan. Under that plan the tire

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[1] The investigation was originally instituted in 1936 but was inactive for many years. Serious investigation was renewed between 1949 and 1951 and from 1951 on all six companies were the subject of a single joint investigation which was completed in 1954. *See Hearings Before Subcommittee No. 1 of the House Select Committee on Small Business on the Organization and Procedures of the Federal Regulatory Commissions and their Effect on Small Business,* 84th Cong., 1st Sess., 447–48 (1956).

and rubber companies pay commissions to the oil companies on sales of the tire companies' TBA to the oil companies' dealers. Each complaint paired one of the large tire and rubber product manufacturers and a large oil company with which it had contracted. The pairings were Texaco and B. F. Goodrich, Shell and Firestone, and Atlantic and Goodyear.[2]

(1) *Background*: In 1961 the Commission rendered separate decisions in each of the three TBA cases. In both *Atlantic-Good-year*[3] and *Shell-Firestone*[4] the Commission found coercion, unlawful tie-ins, and adverse competitive effects resulting from the TBA sales commission agreements. In contrast, however, the Commission in *Texaco-Goodrich*[5] found no coercion and remanded the case to the Hearing Examiner for additional evidence on anticompetive effects.[6] One year later the Examiner filed a revised decision in which he added new findings and reached new and contrary conclusions without complying with the Commission's directive to take additional evidence.

Prior to the second decision, because of statements made about the then pending case by Commission Chairman Paul Rand Dixon to the National Congress of Petroleum Retailers, Inc. in Denver, Colorado, on July 25, 1961, Texaco filed a motion before the Commission that Chairman Dixon withdraw from participating or that he be disqualified. The motion was denied and Chairman Dixon participated in the decision. On April 15, 1963, the Commission affirmed the new conclusions of the Examiner that the agreements were unlawful,[7] but offered

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[2] The pairings were based on the most substantial agreements challenged, although the complaints also challenged the contracts of each respondent with other oil and tire companies not parties to the particular actions.

[3] 58 F.T.C. 309 (1961).

[4] 58 F.T.C. 371 (1961).

[5] 58 F.T.C. 1176 (1961).

[6] The Commission's first remand order declared:

The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon the competitive *effects* of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the exercise of overt coercive tactics or by more subtle but equally effective means. 58 F.T.C. at 1178 (emphasis in the original).

Only one member of the Commission who had participated in the 1961 remand for additional evidence was on the Commission when the case came back in 1963; he dissented on the ground that the Examiner had failed to comply with the Commission's remand order. The order had explicity directed the Examiner to take additional evidence on the sales agreement which the Commission considered indispensable to its disposition of the case.

[7] B. F. Goodrich Co., Docket No. 6485, 62 F.T.C. 1172, 1197 (1963).

no explanation for doing so without the new evidence earlier thought necessary.

On appeal from the second Commission decision this Court in 1964 unanimously held that

> Chairman Dixon's participation in the hearing amounted * * * to a denial of due process which invalidated the order under review * * *. His Denver speech, made before the matter was submitted to the Commission * * * plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act * * *.

Supra at 372, 336 F. 2d at 760. In the Supreme Court the Solicitor General did not challenge this Court's conclusion of disqualifying bias on the part of the Commission Chairman. With respect to the merits, a majority of this Court held that there had been a fundamental failure of proof. Our opinion stated:

> We see nothing illegal or even unethical in the payment of commissions for such services, *except in instances where an oil marketing company forces its dealers through coercive tactics or controlling economic power to buy the sponsored products. Neither of these inferences was proved in this case, and it may not be presumed that either will exist in future similar situations.*

Id. at 375, 336 F. 2d at 763 [emphasis added]. We dismissed the complaint because of this lack of proof and because the undue protraction of the administrative process constituted a denial of due process.

Meanwhile, the Seventh Circuit affirmed the Commission in the *Atlantic* case, *Goodyear Tire and Rubber Co. v. F.T.C.*, 331 F. 2d 394 (7th Cir. 1964), and the alleged conflict between this Circuit and the Seventh Circuit was asserted in the petition for certiorari. The writ was subsequently granted.[7]

In *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965), the Supreme Court affirmed the Seventh Circuit holding that the Atlantic TBA sales commission agreements were an unfair method of competition. One week later in a *per curiam* opinion the Court granted the Commission's petition for a writ of certiorari in *Texaco*, and remanded with instructions

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[7] The *Shell-Firestone* proceedings before the Fifth Circuit had been held in abeyance pending the Supreme Court resolution of the alleged conflict in circuits.

> to remand it immediately to the Federal Trade Commission for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co. v. Federal Trade Commission, ante, p. 537,*

381 U.S. 739 (1965). Pursuant to the remand from this Court, the Commission[7] issued an order on June 18, 1965 (a) vacating its prior 1963 decision, (b) denominating the proceedings before the Commission as appeals from the Examiner's 1962 decision, (c) permitting oral argument and the filing of briefs, and (d) instructing counsel to "focus on the question whether the facts of record in the present case bring it within the Supreme Court's decision in the *Atlantic Refining Co.* case." *Order of the Federal Trade Commission Vacating Prior Decision and Order and Setting Hearing on Remand,* In the Matter of The B. F. Goodrich Co. and The Texas Co., Docket No. 6485, June 18, 1965.

In January, 1966, the Commission entered an order and filed an opinion, which is the subject of this appeal. The Commission held:

> "In our view the Supreme Court's decision in *Atlantic* compels the conclusion that the Texaco-Goodrich plan is an unfair method of competition and that Texaco and Goodrich, as were Atlantic and Goodyear, should be prohibited from performing or entering into any other sales commission plans."

—— F.T.C. ___ (1966). The Commission thus held that the sales commission agreement involved here was indistinguishable in fundamental operation and effect from the one held unlawful in *Atlantic.*

(2) *Contentions.* The Commission contends that (1) the TBA sales commission system is inherently unlawful without regard to any acts of overt coercion and argues that this is implicit in the remand in light of *Atlantic*; (2) by its use of the sales commission system, Texaco has in fact exercised its economic power over its dealers in favor of Goodrich sponsored products; and (3) the sales commission system has given Goodrich an unfair competitive advantage.

[7] Chairman Dixon, having been disqualified did not participate nor did Commissioner MacIntyre. Thus only three Commissioners have participated in the opinion and order now under review. None of the three Commissioners participating were members of the 1961 Commission which directed the Examiner to take additional evidence on the competitive effects of the sales commission contracts.

Texaco's position is (1) that the coercion provision of the Commission's latest order entered against Texaco is not justified on the record; (2) that this order is erroneous independent of the sales commission program; and (3) that the Supreme Court's remand to the Commission required that the asserted illegality of Texaco's sales commission program be re-determined in light of *Atlantic*; furthermore, that illegality under the *Atlantic* holding can be shown only by proof that Texaco coerced dealers to purchase sponsored merchandise and that anticompetitive effects followed. Additionally, Texaco contends that the administrative process has been abused by the unduly long drawn out nature of the proceedings and that this constitutes harassment and warrants dismissal of the proceedings independent of the merits.

We must now determine whether the Commission has complied with the remand order and correctly applied to applicable principles enunciated in the *Atlantic* holding.

(3) *The Atlantic Holding.* Our analysis must begin with the decision in *Atlantic*. In the *Shell-Firestone* case, the third TBA case decided after *Atlantic*, the Fifth Circuit interpreted the *Atlantic* rationale as based on three essential components, the application of each depending on the facts of the particular case before the court:

(a) the oil company's dominant economic power over its dealers;

(b) exercise of that power over its dealers;

(c) anticompetitive effects of using that power.

Shell Oil Co. v. *F.T.C.*, 360 F. 2d 470, 477 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). Both the Commission and Texaco agree with this view of the *Atlantic* holding and this view was essentially adopted by the Solicitor General in the Supreme Court. Our consideration of *Atlantic* leads us to the same view as that of the Fifth Circuit in *Shell*, in short we conclude with Judge Wisdom that the Court hovered near the brink but did not lay down a per se rule.[10]

[10] Several factors compel this conclusion. In the first place, although the Commission took the position that the sales commission contract was illegal per se, the Seventh Circuit implicitly rejected such a view, and the absence of the words "per se" in the *Atlantic* opinion "could hardly have been an accident." *Shell*, *supra* at 477.

Secondly, the Court has stated that when it has had no previous opportunity to assay the effects on competition of a new form of economic activity, it will not declare that activity illegal per se. *White Motor Co.* v. *United*

(a) Existence of Dominant Economic Power

In our prior opinion we found "no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers," *supra* at 374, 336 F. 2d at 762. In *Atlantic* the Court viewed the question of dominant economic power not only in terms of the statistical facts used to show economic dependence but also in terms of specific control devices: (1) control over oil and gas supply; (2) control over dealers through short term leases, equipment loans, etc.; (3) control over advertising; (4) leverage from financial promotion; and (5) housekeeping requirements of leases. Such devices have often been alluded to in demonstrating dominant economic power and leverage. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962).

While the statistical material in the record here is ambiguous, the record fairly demonstrates what is a matter of common acceptance, that both Texaco and B. F. Goodrich are among the giants of their respective industries[11] and as such control large economic leverage.

Many, but not all, of the control devices mentioned in *Atlantic* are present to some degree here. Texaco, of course, controls the supply of oil and gas to its dealers, and the relatively heavy cost of constructing and maintaining a modern service station enables Texaco to maintain substantial economic lever-

States, 372 U.S. 253, 261 (1963); *see also* Mr. Justice Goldberg's dissenting opinion in *Atlantic*, 381 U.S. at 380–90. *But cf. United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 385–86 (1967) (Stewart, J., concurring in part and dissenting in part).

[11] The myriad figures present in our voluminous record support a statistical analysis which assumes dominant economic power. Similar statistics have been fully discussed in the *Shell* case, 360 F. 2d at 479–82 & nn. 21–23.

We think it is sufficient to note the following facts: Goodrich is one of our largest rubber product manufacturers and its sales in 1954, one of the years on which the complaint is based, exceeded $500 million dollars. Texaco sales in the same year exceeded one and one-half billion dollars. The 30,000 Texaco stations which might be subject to the sales commission plan constituted some [illegible] of all service stations in the United States. Finally, from 1952 to 1959 Goodrich sales to all Texaco accounts rose from 12.7 million dollars to 13.9 million dollars. We think these not-insubstantial figures sufficiently support the requirements of a statistical analysis of dominant economic power.

We should make clear, however, our view that statistics alone would not be sufficient to support the finding that Texaco exercises dominant economic power. The statistical record supports our conclusion that the Commission has not set forth with sufficient clarity an adequate statistical record to sustain its other findings.

age through the use of loans, short-term leases, and equipment financing. However, we agree with Judge Wisdom that "the dominance of a major oil company over its dealers comes from the leverage inherent in the structure and economics of the petroleum distribution system * * *." 360 F. 2d at 481.

(b) *Exercise of Dominant Economic Power*

In our earlier opinion we concluded that on the whole record there was no substantial evidence that Texaco had exercised controlling economic power over its dealers, as the Commission had found. Similarly, after careful review of the record, we had concluded that there was no basis for a finding of coercion and that read as a whole the record demonstrated the contrary. We should note at the outset that nothing said by the Supreme Court in *Atlantic* bears on that holding and nothing said by the Commission since the remand alters that conclusion.

We can glean nothing from the utterances of the Supreme Court which alters the basic rule that a finding of coercion is the threshold requirement of a determination of exercise of dominant economic power. As the Commission has noted, it did not ask the Supreme Court to review our holding that the record did not sustain a finding of coercion. Equally true is the fact that in the *Atlantic* case the Seventh Circuit's sustaining of the Commission's findings of coercion were not appealed. But, in spite of this lack of challenge by Atlantic and by the Commission in both cases, the Supreme Court in *Atlantic* did not ignore record evidence of Atlantic's coercive conduct. Indeed, that Court was well aware that the coercion was found to have permeated the entire Atlantic program, contaminating even its neutral conduct.

The Commission argues that Atlantic's coercion merely aggravated the restraint imposed by the sales commission plan. We do not so read *Atlantic*. If the Supreme Court concluded that the sales commission plan was inherently illegal when entered into by a major oil company, it would have had no occasion to take cognizance of the coercive practices and no remand of this case would have been required. Yet the *Atlantic* opinion is replete with references to these practices and we cannot escape the conclusion that the overt coercive acts practiced by Atlantic were deemed essential to the ultimate action of the Court. It is surely of some significance that in almost every page of the *Atlantic* opinion there is some such reference, *e.g.*, "overt

acts," overt coercive pressures," "direct and overt threats," etc., 381 U.S. at 368, 373, 376.

The Commission now asserts that since it did not rely upon coercion as a basis for invalidating Texaco's sales commission agreements, the Supreme Court action vacating our judgment implies a total rejection of Texaco's position. The combination of *Atlantic's* emphasis on overt coercion, to which we have just alluded, the failure of the Commission to challenge our prior holding on this issue when seeking review, and the absence of any reference to the subject in the Supreme Court Per Curiam opinion on remand all tend strongly to negate the Commission's argument. Had the Commission urged on the Supreme Court a *per se* rule of illegality stemming from mere existence of economic power, its failure to challenge our holding on absence of coercion would be understandable.

We have difficulty reconciling the Commission argument with the fact of a remand in this case. If the Supreme Court viewed its holding in *Atlantic* as treating contractual arrangements between the oil company and its dealers in and out of themselves as giving rise to controlling economic power, and that mere salesmanship without any coercion constituted unlawful exercise of such power, there would have been nothing to remand. The Supreme Court could have simply reversed and reinstated the Commission's order.

Of course we realize, as did Judge Wisdom in *Shell*, that the "Company's use of its economic power through the sales commission plan to cause its dealers to buy sponsored TBA *even in the absence of overt coercion*" can constitute an unfair method of competition and a violation of section 5, *Shell* at 482–83 [emphasis added]. The Commission also recognizes this and therefore argues that each of the "non-coercive practices" referred to in *Atlantic* are present in equal degree in this case. The Commission argues that the references to these practices in *Atlantic* compels a conclusion that even the non-coercive practices arising from the contractual relationship constitute the exercise of economic power over dealers. The Commission's contentions must be weighed against the Examiner's finding that Texaco dealers, unlike those of Atlantic and Shell, were free to accept or reject sponsored products. This view of the Examiner may have been influenced by the circumstance that only 5 former Texaco dealers testified to facts which would sus-

tain a finding of coercive practices and more than 50 present and some former dealers testified to the contrary.

In light of all this we do not read *Atlantic* to conclude that the Court was condemning these practices as *per se* illegal. They were indicative of Atlantic's conduct, of a character not shown in this record, of marshalling "its full economic power in a continuing campaign to force its dealers and wholesalers to buy Goodyear products," 381 U.S. at 371. A few examples will suffice:

(1) *Sales Practices.* In *Atlantic*, the oil company,

> was to instruct its salesmen to urge dealers to "vigorously" represent Goodyear, and to "cooperate with and assist" Goodyear in its efforts to promote and increase the sale by Atlantic dealers of Goodyear products.

381 U.S. at 365. The Commission characterizes the evidence here as substantially identical. Yet the Examiner was satisfied that Texaco policy since at least 1948 has been to permit each dealer to choose whatever brand TBA he desires.[13]

The Commission now argues that "on each visit, the [Texaco] salesman offers to write up sponsored TBA orders," but the Commission itself in the order presently under review struck the Examiner's finding that Texaco "salesmen were encouraged by [Texaco] management to write up orders for sponsored TBA without waiting for a formal request from a dealer." (2) *Dual Solicitation and Advance Notification.* In *Atlantic* there was a regular practice of

> "double teaming" solicitation of Atlantic outlets by representatives of both companies to convert them to Goodyear products. They were to call on the dealers together, take stock orders, furnish initial price lists and project future quotas of purchases of Goodyear products.

[13] This policy in part states:

The Texas Company's selling personnel are expected to become familiar with Firestone and Goodrich Inventory Guide Systems and TBA merchandise and the merchandising of TBA products generally. But it should be clearly understood that we will render equal assistance to all dealers in setting up and maintaining his own basic TBA stock assortment and Inventory Guide system along these lines regardless of the brand of merchandise handled. * * * [The Inventory Guide] is not applied in any manner whatsoever that would impair any dealer's freedom to purchase such brands and quantities of TBA merchandise as he desires.

Our dealers, consignees and distributors are independent businessmen, and instructions that no undue influence is to be used to interfere with their free and independent judgment remain unchanged.

381 U.S. at 365. The Commission contends such practices are prevalent in this record. The Examiner found that "double teaming" and advance solicitation—notice to the tire companies that a new station was about to become operable—were isolated and sporadic practices, not a regular or even frequent practice as was the case with Atlantic's operations. They appeared in *Atlantic* in the context of an entire system designed to overtly coerce its dealers. This is not the state of the record before us.

(3) *Dealer Policing and Credit Cards.* In *Atlantic* the Supreme Court was confronted with evidence that Atlantic imposed quotas on dealers and effectively policed them by the use of a reporting system of purchases and sales of TBA. In the original appeal to this Court, the Commission contended that the quota and policing system were also used by Texaco. In the present appeal the Commission has retreated from this position. As to credit card policy, the Examiner carefully distinguished the *Atlantic* record from the instant record and significantly found that Texaco does permit dealers to charge *non-sponsored* TBA on its credit cards.[12]

(4) *Geographical Supply Points.* In *Atlantic,* Goodyear required that Atlantic assign its dealers to a single point of TBA supply. This geographical division of supply points is not present in our record and, indeed, the Examiner found that as to sponsored TBA sales, each dealer did not buy exclusively from, and was not limited to, any particular supply point but was free to deal with any source he chose.

These few examples demonstrate a different set of facts between the *Atlantic* record and this case. On the basis of the record before us we cannot conclude that Texaco exploited its service station market illegally for the benefit of itself and Goodrich. In short, we do not find that Texaco used its controlling economic power to compel its dealers to purchase sponsored TBA.

(c) *Anticompetitive Effects*

Atlantic's third requirement for finding a violation of section 5 is that the TBA sales commission contracts must result in

[12] Since 1955 Texaco practice is to permit deferred payment of sponsored TBA on credit. Thus, three months is permitted on purchases of [illegible] or less, six months on purchases of [illegible] or more. The Examiner held that this limitation of deferred payment to sponsored TBA was altogether reasonable and proper. But the record also shows that dealers continue to charge non-sponsored TBA on a monthly basis without a dollar limitation.

adverse competitive effects on the relevant market. As we have previously noted, the first Commission remand of the case to the Examiner in 1961 was because of the need for additional evidence on the issue of anticompetitive effects. We have further noted that no such evidence was forthcoming. In our prior review of this case we also found that evidence of anticompetitive effects was lacking.

The Commission urges the following three guidelines to be the essence of the *Atlantic* holding on anticompetitive effects:

> (1) Extensive economic analysis of the competitive effect based on examination of the entire TBA market is unnecessary.
>
> (2) Evidence of economic justification or benefit to the parties concerned is immaterial.
>
> (3) It is sufficient when the Commission finds that a substantial portion of commerce is affected.

This, of course, explains the Commission position that the TBA system is an "inherently anticompetitive" device from which "competitive injury must result." This is simply a renewed intimation of a *per se* rule in *Atlantic* and needs little discussion since we have already rejected that reading. It is true, of course, that the guidelines suggested by the Commission are referred to in the *Atlantic* opinion, *e.g.*, 381 U.S. at 370–371. But it is also true, as Judge Wisdom pointed out in his discussion of these guidelines, that the Court in *Atlantic* looked to the full record for examples of anticompetitive effects. 360 F. 2d at 483. Indeed, the Court was very clear on this point:

> The anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications * * *

381 U.S. at 371.

Bearing in mind the Fifth Circuit's caveat of an overlap between a discussion of anticompetitive effects and the exercise of dominant economic power, we proceed to examine the record before us. As *Atlantic* noted, the question is whether the TBA system "impaired competition at three levels [manufacturing, wholesaling, and retailing] of the tires, batteries and accessories industry," *id.* at 370. And, of course, it goes without saying that the type of competition at these levels—interbrand and intrabrand—is highly relevant.

(a) Interbrand Competition

Under the TBA system interbrand competition manifests itself, if at all, most perceptively at the wholesale level. We recognize that wholesalers of competing TBA brands may well be substantially limited in selling their products to service stations under contract with major oil companies. The TBA system may deprive retailers of their freedom of choice as to the TBA products they may choose. Such competitive effects also reach back to the manufacturing level. For example, to the extent that wholesalers are unable to sell their products to service outlets, the manufacturers may suffer injury. To that extent producers' distribution systems may be impaired and expansion potential circumscribed.[14]

As an example of interbrand anticompetitive effects in *Atlantic* the Court found a classic division of territories between Goodyear and Firestone, the two manufacturers involved: "Firestone and Goodyear were excluded from selling to Atlantic's dealers in each other's territories," 381 U.S. at 370. Flowing directly from this was the further adverse effect that Atlantic dealers could only buy at the prices designated by supplier to whom the territory had been allocated, *ibid.* Finally, there was little doubt but that the combination of these and other practices in the *Atlantic* record, including the resort to overt coercion, had the drastic anticompetitive effect of almost completely foreclosing the market to Atlantic's own retailers and wholesalers who desired to sell brands other than sponsored products and to wholesalers and manufacturers of competing brands with similar desires.

We have earlier noted the fact that the record before us is devoid of evidence disclosing any form of territorial division of markets on the part of the sponsored manufacturers. And we have also referred to the long standing Texaco policy that Texaco dealers are free to purchase any brand of TBA which they desire to sell. *See* note 12, *supra.* Similarly, there is no evidence that any form of price dictation occurred.

But the most significant evidence on the question of interbrand anticompetitive effects concerns the testimony of Texaco dealers and sponsored and competing suppliers. The Commission relies upon testimony of former Texaco dealers and

[14] *See* Kleen, *Analysis of the Sales-Commission System of Tires, Batteries, and Accessories Distribution in Retrospect: Answers For An Incisive Dissent*, 44 Texas L. Rev. 890, 911 (1966).

competing TBA suppliers to the effect that nonsponsored TBA could not be sold to Texaco dealers because of the dealer's understanding that they were required to purchase sponsored TBA. The Commission corroborates this testimony with "representative evidence" that in certain Texaco districts the percentage of dealers who carried sponsored TBA ranges from 70% to 89%. This evidence and these figures were rejected by the Examiner in his original decision and by the first Commission decision. The Examiner's modification of this position, which as we noted was made with no new evidence, was affirmed by the second Commission decision, and this Court rejected those findings on the prior appeal as unsupported in the record. Nothing has developed to change our view, and indeed on remand the Commission has stricken the Examiner's finding. The Commission now limits its characterization of the testimony of competing suppliers to a statement that "practically all of the representatives of the competitors of Goodrich *called as witnesses* testified" that they were foreclosed from the Texaco service station market. We simply cannot regard this as "representative;" such a conclusion is not supported by substantial evidence, except in isolated instances which were generally contradicted by overwhelming rebuttal evidence. Nor can we accept the Commission view that the rebuttal testimony is to be discounted because witnesses are under "pressure" from Texas. A finding of pressure on witnesses before a tribunal is not one to be lightly inferred and ought not be made without evidence of some kind; none is suggested by the Commission on this score.

(b) Intrabrand Competition

A second form of competition, intrabrand, is the inevitable result of the supply point system noted in *Atlantic*. The adverse anticompetitive effects are similar to those found in interbrand competition—pricing, territorial market foreclosure, and full-line forcing.[18] Without laboring the point, we have already noted that the record in the instant case simply cannot be said to reflect substantial evidence to support a finding that these practices exist in a measure adequate to demonstrate that the

[18] In the *Atlantic* case the Seventh Circuit found that:

[B]oth Goodyear and Firestone said that they would refuse to sell only tires under the sales commission plan and insisted that they be allowed to handle batteries and accessories as well as their own products.

331 F. 2d at 398.

Texaco TBA contract causes adverse anticompetitive effects. We therefore hold that there is an absence of substantial evidence which supports a finding of anticompetitive effects.

The Commission maintains that the first Commission opinion remanding for evidence of anticompetitive effects was "enigmatic," and that it is enough that a substantial portion of commerce is affected under the rationale of *Atlantic*. Surely there is nothing obscure or ambiguous in a remand predicated on an absence of crucial evidence especially where the remand directs a further inquiry for relevant evidence. And we find no basis for treating the *Atlantic* case as carrying the test of quantitative substantiality to the brink of extremism by a strained literalism. Indeed, we are inclined to believe that the Commission views the situation, as the Commission opinion and brief candidly concede, as one in which it would be arbitrary and inequitable to bar Atlantic and Shell, who are very much like Texaco in broad outline, from use of the sales commission plan while permitting Texaco to continue its operation. We agree that it would be inequitable, and indeed a dereliction of the Commission's obligations, *provided* that all three were guilty of substantially equal violations of section 5. But simply because Texaco is in the same line of business does not mean it must suffer the pain of the misdeeds of other oil companies; this would indeed by [sic] guilt by association. We conclude that the record simply does not support a finding that Texaco violated the Act. We therefore hold that while the record shows Texaco indeed has dominant economic power, it is fatally deficient on the crucial issues of exercise of that power and subsequent anticompetitive effects.

CONCLUSION

One course available to us would be to remand this case once again to the Commission to permit it to develop additional evidence for the record [16] but the Commission and Examiner have had abundant opportunity—and direct mandate—to do this in the past and have not done so. We think the time has now come to terminate these protracted proceedings and dismiss the complaint. We recognize that the Commission's

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[16] Even in a remand to the Commission for further proceedings it would have been imperative to make clear our view that the coercion aspect of the Commission order has no basis in law, or the record. Since we have twice determined there is no basis that Texaco overtly coerced any substantial number of dealers or that a pattern of coercion existed, the provisions of the order prohibiting such coercion were and are baseless.

obligations and the public interest in preserving competition are not to be lightly dealt with but the Commission has now had more than an adequate opportunity to develop a record in support of its section 5 contentions over a period of fourteen years. Accordingly, the Commission order under review is set aside and remanded to the Commission with directions to dismiss the complaint.

Reversed and Remanded.

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1967

No. 20058

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 20061

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

(United States Court of Appeals for the District of Columbia Circuit; filed September 25, 1967; Nathan J. Paulson, clerk).

On Petitions to Review an Order of the Federal Trade Commission.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Burger, Circuit Judge.

JUDGMENT

These cases came on to be heard on the record from the Federal Trade Commission, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Trade Commission on review in these cases is set aside, and these cases are hereby remanded to the Federal Trade Commission with directions to dismiss the complaint.

Per Circuit Judge BURGER.

Dated: September 25, 1967.

A true copy.

Test:

NATHAN J. PAULSON,

Clerk of the United States Court of Appeals for the District of Columbia Circuit.

SUPREME COURT OF THE UNITED STATES

No. 1049, October Term, 1967

FEDERAL TRADE COMMISSION, PETITIONER

v.

TEXACO, INC., ET AL.

Order allowing certiorari—Filed March 11, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1968